LIBRARY
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

RICHARD C. GLESNER
ROBERT D. MARTIN
PAUL A. CROAKE
Counsel for Petitioner

Ross, Stevens, Pick & Ross, S.C.
110 East Main Street
Madison, Wisconsin 53703

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 3

CONSTITUTIONAL PROVISIONS, STATUTE AND ORDINANCES INVOLVED 4

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 14

I. By Determining That A Legislative Classification Discriminating Against Emotionally Disturbed Children Was Not Suspect, The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court 18

II. By Refusing To Scrutinize The Means Used (Discrimination Against Emotionally Disturbed Children) To Achieve The Legislative End (Protection And Maintenance Of The Traditional Family Pattern In The Community), The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court 21

CONCLUSION 24

Page

CITATIONS

CASES:

Abbott House v. Terrytown,
34 App. Div. 2d 281,
312 N.Y.S. 2d 841 (1970) 13

Boraas v. Village of Belle Terre,
476 F. 2d 806 (2nd Cir. 1973)
U.S. Appeal Docketed, No. 191,
42 U.S.L.W. 3109.
probable jurisdiction noted,
42 U.S.L.W. 3226 14,15,16,17,21

City of Des Plaines v. Trottner,
34 Ill. 2d 432, 216 N.E. 2d 116 (1966) 19

Dunn v. Blumstein,
405 U.S. 330 (1972) 18

Eisenstadt v. Baird,
405 U.S. 438 (1972) 15,17,21

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 15

Graham v. Richardson,
403 U.S. 365 (1971) 18,19

Jackson v. Indiana,
406 U.S. 715 (1972) 15

James v. Strange,
407 U.S. 128 (1972) 15

Page

Kirsch Holding Company v.
Borough of Manasquan,
59 N.J. 241, 281 A. 2d 513 (1971) 19

Loving v. Virginia,
388 U.S. 1 (1967) 15,18

Madison Metropolitan Sewerage
District v. Committee,
260 Wis. 229, 50 N.W. 2d 424 (1951) 21

McLaughlin v. Florida,
379 U.S. 184 (1964) 18,19

Reed v. Reed,
404 U.S. 71 (1971) 15,17,21

Shapiro v. Thompson,
394 U.S. 618 (1969) 15

United States v.
Carolene Products Co.,
304 U.S. 144 (1938) 18-19

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 15

CONSTITUTIONAL PROVISIONS:

Due Process Clause, U.S. Const.,
Amend. XIV, Sec. 1 4,15

Equal Protection Clause, U.S. Const.,
Amend. XIV, Sec. 1 4,13,15,16,17

Page

WISCONSIN STATUTES, 1971

§59.97 4,22

DANE COUNTY ORDINANCES (1971)

§10.01 (18) 5,12,23

§10.01 (19) 5,12,23

§10.02 (1) 5

§10.12 (1) (a) 6

§10.12 (2) (c) 6,12

§10.25 (4) (a) 7

§10.25 (4) (g) 7,20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The petitioner, Browndale International Limited, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceeding on June 18, 1973.

OPINIONS

The opinion of the Supreme Court of Wisconsin (R. 184, App. 1)[1] is officially reported at 60 Wis. 2d 182 and is unofficially reported at 208 N.W. 2d 121.

The opinion of the Wisconsin Circuit Court (R. 101, App. 26) is not reported.

The memorandum decision of the Dane County Board of Adjustment (R. 126, App. 48) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on June 18, 1973. A timely motion for rehearing was denied on September 10, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

---

[1] References to "R. —" are to the certified record. References to "App. —" are to the separate Appendix to this petition. References to "Ex. —" are to exhibits filed with the Circuit Court, which are part of the record in the Court below and in this Court.

QUESTION PRESENTED

Is it constitutional to exclude privately operated homes for up to five emotionally disturbed children from a single family dwelling zone district on the ground that such homes do not constitute traditional-biological-marriage family groups.

CONSTITUTIONAL PROVISIONS STATUTE AND ORDINANCES INVOLVED

The constitutional provisions, statute, and ordinances involved are the Due Process and Equal Protection Clauses of the United States Constitution; §59.97(1), Wisconsin Statutes; and §10.01(18)(a), §10.01(19), §10.02(1), §10.12(1)(a), §10.12(2)(c), and §10.25(4)(a) and (c), Dane County Ordinance.

DUE PROCESS AND EQUAL PROTECTION CLAUSE, U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 59.97(1), WIS. STAT. (1971)

> 59.97 Planning and zoning authority. (1) PURPOSE. It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to insure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds. To accomplish this purpose the county board of any county may plan for the physical development and zoning of territory within the county

as set forth in this section and shall incorporate therein the master plan adopted pursuant to s. 62.23(2) or (3) and the official map adopted pursuant to s. 62.23(6) of any city or village therein.

§10.01(18)(a) and (19), DANE COUNTY ORDINANCE (1971)

10.01 DEFINITIONS. For the purposes of this ordinance, certain terms used herein are defined as follows:

. . .

(18) Dwelling:

(a) Single Family Dwelling: A building designed for and occupied exclusively as a residence for one family.

. . .

(19) Family: Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related living together on the premises as a single housekeeping unit, including any domestic servants.

§10.02(1), DANE COUNTY ORDINANCE (1971)

10.02 DISTRICTS

(1) Creation: For the purpose of promoting the public health, safety and general welfare, by regulating, restricting and determining the location of trades and industries and the location, height, bulk and number of stories, the size of buildings and other structures, and percentage of lot which may be occupied, the size of yards and other open spaces, the density of population, the location of buildings designed for specific purposes, and of establishing districts of such number, shape and area as are best suited to carry out the purposes of Section 59.97, Wisconsin Statutes, Dane County, outside the limits of incorporated villages and cities, is hereby divided into districts as follows:

(a) R-1 Residence District
(b) R-2 Residence District
(c) R-3 Residence District
(d) R-3A Residence District
(e) R-4 Residence District
(f) RH-1 Residence District
(g) RE-1 Recreational District
(h) B-1 Local Business District
(i) A-1 Agricultural District
(j) C-1 Commercial and Light Manufacturing District
(k) C-2 Commercial and Light Manufacturing District
(l) M-1 Industrial District
(m) CO-1 Conservancy District

§10.12(1)(a), DANE COUNTY ORDINANCE (1971)

10.12 A-1 AGRICULTURAL DISTRICT

(1) PERMITTED USES

(a) Single family detached dwelling units.

. . .

§10.12(2)(c), DANE COUNTY ORDINANCE (1971)

10.12 A-1 AGRICULTURE DISTRICT

. . .

(2) PERMITTED USES WHICH ARE SUBJECT TO PROVISIONS OF 10.25 (4) APPLICATION FOR APPROVAL OF SITE

. . .

(c) Hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanages provided such buildings shall be located not less than 50 feet from any lot in a residence district.

§10.25(4)(a) and (g), DANE COUNTY ORDINANCE (1971)

10.25 ADMINISTRATION, ENFORCEMENT AND PENALTIES

. . .

(4) APPLICATION FOR APPROVAL OF SITE

(a) *Purpose*: The development and excution (sic) of this ordinance is based on the division of the County into districts within which districts the use regulations are substantially uniform. It is recognized, however, that there are certain uses which, because of their unique or varying characteristics, are not permitted in any particular district without consideration, in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location.

. . .

(g) *Standards*: The committee shall approve or recommend approval to the Dane County Board of Supervisors if it shall find:

(1) That the establishment, maintenance, or operation of the proposed use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare, when considered in relationship to the site.

(2) That the proposed use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property value within the area,

(3) That the establishment of such use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district,

(4) That adequate utilities, access roads, drainage and necessary facilities have been provided,

(5) That adequate measures have been taken to provide ingress and egress so designed to minimize traffic congestion in the public streets, and

(6) That the proposed use conforms to the applicable regulations of the district in which it is located.

STATEMENT OF THE CASE

Respondent, Board of Adjustment, decided that petitioner's homes did not fall within the meaning of a "single family dwelling" as defined in the Dane County Zoning Ordinance. (R. 126, App. —). The Board determined that the use contemplated by Browndale required "site approval" under Section 10.12(2)(c) of the Ordinance. In essentially a trial *de novo* before Judge George R. Currie,[2] the Wisconsin Circuit Court reversed the Board's decision and held that such homes are single family dwellings if not more than five children reside therein; and if more than five children reside in such home, then site approval is required under the Ordinance. (R. 122, App. 47). The Supreme Court of Wisconsin reversed the Circuit Court and reinstated the Board of Adjustment's decision and stated that its mandate did not violate the Equal Protection Clause of the Constitution (R. 184, App. 1).

On May 15, 1973, the Circuit Court announced its decision. The facts, as principally found by the Circuit Court, are as follows:

---

[2]Judge Currie is the former Chief Justice of the Supreme Court of Wisconsin, sitting as Reserve Circuit Judge.

Petitioner, Browndale International Limited, is a Canadian corporation founded by its President, John Brown. Brown is a psychiatric social worker by profession and has worked with socially disturbed children since 1944. In 1966, Brown started the privately operated Browndale program, commencing in Ontario and then branching out into the United States. There are now fifty Browndale homes being operated in the United States and Canada. (R. 102, App. 28).

The guiding principle of the Browndale program is to duplicate for the emotionally disturbed child as nearly as possible in the Browndale home what a child would get if living with his own family. (R. 102, App. 28). The Browndale model is comprised of a family home situated in the community, consisting of a man and a woman who function as surrogate parents and a small group of children living together as a family. Meals are prepared and served as they would be in any private family. (R. 102, App. 28).

There was testimony that children in Browndale homes may attend the community's public school system. The children however, do not attend such public schools if Browndale determines that a child cannot succeed there. Browndale children may join the YMCA or YWCA as individuals and, in some instances, a Browndale home will take out a family membership in such an organization. Children take music lessons, join the Boy Scouts, etc., only if it is determined that they can successfully participate in such activities. (R. 167.)

Each Browndale home is housed in a private dwelling, the exterior of which is no different than other private homes in the neighborhood. No signs are erected on the premises or affixed to the home to indicate that it is a home for emotionally disturbed children. (R. 103, App. 29).

Browndale, through its subsidiary, Involvement Centers, Wisconsin, Inc.,[3] (hereinafter "Involvement Center") operates six[4] homes in Dane County. Each home is staffed by an employee who does cooking and housework and a lady who comes in and stays with the children at night. No staff member sleeps on the premises, only the children. In addition, Involvement Center has nurses and social workers in its employ who visit the homes and has contracted with a psychiatrist and a pediatrician to supply services as needed for an hourly charge. (R. 102, App. 29).

All children in Dane County Browndale homes are placed there are a result of juvenile court proceedings. Their maintenance of $37.00 per day is either paid by the State or by the county. (R. 103, App. 29). The six homes are inadequate to meet the referrals from the State of Wisconsin. Children are in a Browndale home voluntarily and they are transferred elsewhere when they express a desire to leave.[5] (R. 104, App. 29).

Browndale homes are operated in Wisconsin under the auspices of the Department of Health and Social Services, Division of Family Services (hereinafter "Department"). (R. 104, App. 30). Initially, Browndale homes were licensed as "foster homes" by the Department. Subsequently, Involvement Center was licensed as a "child welfare agency" by the Department.[6]

---

[3]Typically Browndale purchases a home and then leases it to its subsidiary, Involvement Center, which directly supervises the operation of the home.

[4]The number of homes operated are as of the commencement of this action.

[5]The average period a child stays in a Browndale home is two years (R. 104, App. 29).

[6]For a full description of how the homes are licensed, *see* (R. 104-106, App. 30-32).

On December 8, 1971, and January 22, 1972, petitioner's written offers to purchase six parcels of land, each having on it a private family dwelling house, in the Town of Cottage Grove were accepted. (R. 107, Ex. 7 and 8). Each offer contained the following material condition:

> . . . approval from municipality, county or state, whichever governmental agency has jurisdiction for purchaser's special use of this property under proper zoning. (R. 107, App. 33).

The "special use" referred to in the last stated condition is the operation of Browndale homes by Involvement Center.

One of the homes covered by the offers had been previously leased directly to Involvement Center by the owner. (R. 107, App. 33). It was petitioner's intention, after purchasing the property, to lease all six homes covered by these offers to Involvement Center for the same purpose if the zoning condition in the offers were removed.

In January, 1972, petitioner and Involvement Center consulted with Lavern J. Enger, Dane County Zoning Supervisor, regarding what, if anything, had to be done under the Ordinance in order to operate Browndale homes under the contracts of purchase in the Town of Cottage Grove. (R. 180). Enger ruled that inasmuch as foster homes had been permitted under the single family dwelling use in residential districts, and Browndale homes had previously been licensed to operate as foster homes by the Department, it made no difference that these homes were now licensed as a child welfare agency because neither foster homes nor child welfare institutions were specifically covered by the Ordinance. Therefore, it was

Enger's ruling that no affirmative steps need be taken under the Ordinance in order for the proposed Browndale homes to be operated in the A-1 Agricultural District in the Town of Cottage Grove. (R. 108-109, App. 34).

The Town of Cottage Grove appealed Enger's ruling to the Dane County Board of Adjustment. A public hearing was held before the Board on March 10, 1972. On March 17, 1972, the Board decided that: (1) Browndale homes treat emotionally disturbed children; (2) Browndale homes do not qualify as a "single family dwelling" as that term is defined by Sec. 10.01 (18) and (19) of the Ordinance since it was "not the intent of the definition of a single family dwelling to include treatment of unrelated emotionally disturbed children by unrelated persons"; (3) Such homes are of a type of use that falls within the category of institutions listed in Sec. 10.12 (2) (c) of the Ordinance and, therefore, require site approval; and (4) Petitioner was ordered to desist from operating such homes in the Town of Cottage Grove until site approval had been obtained from the Dane County Zoning Committee.[7] (R. 126, App. 48).

From these facts, the Circuit Court reversed the decision of the Board by judgment entered May 15, 1972, in a proceeding of review by certiorari. The Circuit Court held that Browndale homes in which not more than five emotionally disturbed children reside qualified as a single family dwelling under the Ordinance and required no site approval to operate in Dane County. If more than five such children resided in said homes, then site approval was required. (R. 118, App. 43).

---

[7] As noted, Involvement Center was operating a home in the Town of Cottage Grove on a lease arrangement from the owner. *See* p. — *supra*.

In making this determination, Circuit Judge Currie recognized that a different holding would render the Zoning Ordinance unconstitutional (R. 117, App. 42):

> The welfare of emotionally disturbed children living in Browndale homes requires that such homes be located where other private families reside, and not be confined to a district zoned as a commercial or industrial district. A zoning ordinance which does not permit such houses to be located in any district where families usually reside would in the Court's opinion be unconstitutional. A State interest is involved because the Division of Family Services places children in these homes, and a zoning Ordinance which excludes them from all residential districts would be unconstitutional. ***Abbott House v. Terrytown*** (1970), 34 App. Div. 2d 281, 312 N.Y.S. 2d 841.

In considering the change in licensing by the State from "foster home" to "child welfare agency" as it affected zoning determinations, the Circuit Court stated (R. 114, App. 39):

> While dealing with this matter of licensing as a child welfare institution it must be kept in mind that *the nature of the operation of the Browndale homes in Dane County did not change one iota* from what it was when they were licensed as foster homes with respect to any aspect which would affect zoning. As Miss Neupert testified, their operation does not have the characteristics of what one ordinarily associates with institutional care of children. Furthermore, it is conceded that foster homes, in which not more than five unrelated persons reside, qualify as single family dwellings under the ordinance. It would clearly be a denial of equal protection of the laws under the Fourteenth Amendmend to so interpret and administer the ordinance as to permit foster homes having no more than five unrelated persons residing therein in residential and agricultural districts without the necessity of site approval, and require site approval for a Browndale home having no more than five unrelated children and no adults residing therein. [Emphasis added.]

The decision of the Wisconsin Circuit Court was reversed by the Supreme Court of Wisconsin (the Court Below) by mandate on June 18, 1973. (R. 204, App. 25). The Court below explicitly decided that such a determination was not in violation of constitutional equal protection. (R. 201, App. 22). The cause was, therefore, remanded to the Wisconsin Circuit Court with directions to affirm the decision of the Board of Adjustment. Petitioner's motion for rehearing* was denied on September 10, 1973. (R. 205).

REASONS FOR GRANTING WRIT

The first and paramount reason why a writ of certiorari should be granted is that the decision below is in direct conflict with *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d. Cir. 1973) U.S. *Appeal Docketed*, No. 191, 42 U.S.L.W. 3109. This Court has recently noted probable jurisdiction in *Boraas*, 42 U.S.L.W. 3226. *Boraas* and this case have similar factual contexts in that each involves: (1) a challenged classification under a "single family" zoning ordinance; and (2) small groups of unrelated persons who, although they function as single housekeeping units, are excluded by the zoning ordinance.

The Second Circuit Court of Appeals in *Boraas* ruled that it was discriminatory to exclude small household groups from a one-family zone district if based upon the ground that such groups are not traditional-family units. The Court below held that it was not discriminatory to exclude groups of emotionally disturbed children from a single family zone district when

---

*The Supreme Court cited fourteen factual distinctions between Browndale and foster homes which were contrary to or wholly unsupported by the record. This was brought to the Court's attention by petitioner's brief in support of its motion for rehearing. The briefs in support of and in opposition to the motion for rehearing have been certified and are part of the record in this court.

the legislative purpose was perceived as identical to that in *Boraas*, *i.e.*, preservation of the traditional-family pattern in the district.

First, the *Boraas* Court suggested that if a suspect classification were involved, that the "strict scrutiny" standard should be applied to determine whether there had been a violation of constitutional equal protection. *Boraas* determined that the group discriminated against (students) did not render the classification "suspect" so as to invoke the stricter standard. The Court below did not consider this question even though the challenged classification discriminated against groups of emotionally disturbed children.

This Court has held from the very outset of its consideration of the matter, that local zoning ordinances, products of the exercise of delegated state police power, must satisfy the requirements of due process, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and equal protection.[9] This Court has stated that where a classification provides for differential treatment on the basis of suspect criteria that the governmental purpose must be "compelling" and classification must be "necessary" to achieve this purpose. *Shapiro v. Thompson*, 394

---

[9]Petitioner assumes for the purpose of this petition that either the "new equal protection" or so-called "strict scrutiny" test should be applied because of the suspect classification involved here (emotionally disturbed children) *Loving v. Virginia*, 388 U.S. 1 (1967) or the new standard which focuses on the rationality of the means used to attain the object of the statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S.

U.S. 618 (1969). Yet the Court below has held that the local zoning authority may differentiate between petitioner's homes and traditional-families (including foster homes) on the basis that petitioner's homes are for emotionally disturbed children without any governmental showing that its purpose is compelling or that this classification is necessary to achieve that purpose.

The importance of this dangerous constitutional precedent to emotionally disturbed children as a class is readily apparent. It means that emotionally disturbed children may be successfully barred from living in residential areas throughout the United States. They will be relegated to institutions, ostracized from the rest of society, in undesirable commercially zoned districts. This will result merely because an illness has beset them, through no fault of their own and which in no way inhibits necessarily their ability to be a part of society.

The decision of the Court below has ramifications other than in zoning. In any instance where the state's police power is exercised, emotionally disturbed children can be freely discriminated against if there is a theoretical showing that some legitimate state purpose is being coincidentally furthered.

Second, the *Boraas* Court applied a "rationality of means" test, distilled from recent decisions of this Court, when it considered whether the challenged classification violated the Equal Protection Clause. Using this standard, it found that the

classification did not satisfy constitutional equal protection. The Court below held that the "minimal scrutiny" standard was the appropriate one to be applied and found that the challenged classification satisfied equal protection requirements.

This Court, in several recent equal protection decisions, has evidenced an intent to scrutinize the rationality of means used to effectuate the object of a statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). Under this approach, the test for the application of the Equal Protection Clause is whether the classification is, in fact, substantially related to the legislative purpose and is not void for other reasons such as overbreadth. The decision below singularly neglected to consider the rationality of the means to the ends in question or whether the classification used was too sweeping, excessive or overinclusive. Its failure to do so poses danger not only to emotionally disturbed children but also to others who do not constitute traditional-family groups.

The decision below means that local zoning authorities can further homogenize their communities by excluding groups similar to emotionally disturbed children in furtherance of a social predilection[10] in the form of entrenched family units. Groups of mentally retarded children could likewise be excluded. Rehabilitated drug addicts or alcoholics who choose to live together could be excluded from residential areas as "not desirable."

Because of the direct conflict with *Boraas*, where this Court has noted probable jurisdiction, and because of the

---

[10] Assuming *arguendo* that such is a valid zoning objective.

important implications of the decision below for emotionally disturbed children as well as other groups insofar as it affects where they may live, it is incumbent that this Court grant certiorari to correct the manifest error of the Wisconsin Supreme Court.

I. By Determining That A Legislative Classification Discriminating Against Emotionally Disturbed Children Was Not Suspect, The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court.

This Court has consistently given judicial solicitude to minorities that appeared permanently voiceless and invisible and to whom the political process paid little heed. *Loving v. Virginia*, 388 U.S. 1 (1967), [race]; *Graham v. Richardson*, 403 U.S. 365 (1971), [alienage]. Where this Court has found such a minority, it has required that the governmental purpose achieved by the discrimination is "compelling," *Graham v. Richardson*, 403 U.S., at 375; "overriding" *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); "important" *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); or substantial, and that the use of the classification is "necessary to the accomplishment" of its purpose, *McLaughlin v. Florida*, 379 U.S., at 196; *Loving v. Virginia*, 388 U.S., at 11.

The holding of the Court below conflicts in principle with the above decisions because of its failure to consider the classification by the respondent Board of Adjustment (emotionally disturbed children) as suspect. Emotionally disturbed children as a class are a prime example of a "discrete and insular" minority, *United States v. Carolene*

Products Co., 304 U.S. 144 (1938) for whom "heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S., at 372.

This Court has consistently emphasized that a governmental body which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin v. Florida*, 379 U.S., at 196, a burden which requires it to show that its purpose or interest is both constitutionally permissible and substantial, and that the classification is "necessary" to achieve that purpose.

The Court below upheld the subject classification by the respondent Board of Adjustment on the ground that the legislative purpose of the Zoning Ordinance was to maintain the traditional family pattern, *i.e.*, occupancy of single family dwellings by traditional-biological-family groups. The effect of this legislative purpose is to structure socially the community in a homogeneous basis by compelling its residents to conform to the traditional family pattern. Such a goal does not relate to the public health, safety or welfare. *Kirsch Holding Company v. Borough of Manasquan*, 59 N.J. 241, 281 A. 2d 513 (1971); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966).

The Court below states that it cannot reasonably be said that the respondent Board of Adjustment is attempting to exclude emotionally disturbed children from the Town of Cottage Grove (R. 200, App. 20):

> The fact that the Board has already allowed one therapeutic home in this disputed district in the town of Cottage Grove evidences this. It cannot be reasonably said that the Board is attempting to thwart this method of care and treatment for emotionally disturbed children.

By reinstating the Board of Adjustment's decision, however, the Court below directed the petitioner to cease and desist operating said home in the Town of Cottage Grove without first obtaining site approval. The Ordinance provides that site approval is obtained by application to the Dane County Zoning Committee. The standards which the Dane County Zoning Committee uses in making its determination,[11] (with respect to approval of site) would allow it to exclude emotionally disturbed children on the basis that they are ". . . injurious to the use and enjoyment of other property in the immediate vicinity. . . ."[12] Unfettered by constititional limitations, the Zoning Committee could freely prohibit emotionally disturbed children from living in the Town of Cottage Grove.

Not only did the Court below erroneously determine that the discriminatory classification was legitimate, but failed to show how the purpose was at all compelling. Even if the above-stated purpose (maintenance of traditional family pattern) for the classification were constitutionally legitimate, it still could not be said that it is compelling.

Since the Court below found no legal discrimination at all in separately classifying Browndale homes on the basis of the emotionally disturbed children living there, it gave no consideration to the nature of the governmental purpose. Petitioner submits that no compelling state purpose is involved. The suggested legislative purpose is not of the paramount nature required to exclude emotionally disturbed children as a class.

---

[11] Section 10.25 (4)(g), Dane County Zoning Ordinance (1971).

[12] Section 10.25 (4)(g)(2), Dane County Zoning Ordinance (1971).

II. By Refusing To Scrutinize The Means Used (Discrimination Against Emotionally Disturbed Children) To Achieve The Legislative End (Protection And Maintenance Of The Traditional Family Pattern In The Community), The Court Below Has Decided An Important Constitutional Question Contrary To Applicable Decisions Of This Court.

This Court, in several recent equal protection decisions, has evidenced an intent to scrutinize the rationality of means used to effectuate the object of a statute. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). The new standard of review has been described as one which permits:

> . . . consideration to be given to evidence of the nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it. . . . If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld. If not, it denies equal protection. *Boraas v. Village of Belle Terre*, 476 F. 2d 806, 814 (2d. Cir. 1973) U.S. *Appeal Docketed*, No. 191, 42 U.S.L.W. 3109, probable jurisdiction noted, 42 U.S.L.W. 3226.

The Court below applied the "old equal protection" or "minimal scrutiny" standard in arriving at its decision.

> In *Madison Metropolitan Sewerage District v. Committee* (1951), 260 Wis. 229, 253, 50 N.W. (2d) 424, we stated that:
>
> The question of classification is primarily for the legislature, both as to need and basis . . . All that seems

> to be required is that there must be some reasonable basis along general lines for the adoption, all reasonable doubts to be resolved in favor thereof. . . . (R. 201, App. 22).

The Court below did not focus on the factual rationality of the legislative means under attack as suggested by the decisions of this Court but rather determined that the classification would be upheld if any state of facts could reasonably be conceived to justify it. The Court below conceived of fourteen factual distinctions between Browndale homes and foster homes which would permit separate legal classification. (R. 201-203, App. 22-24). These factual distinctions were contrary or wholly unsupported by the record. This was brought to the attention of the Court by petitioner's brief in support of its motion for rehearing.

Petitioner has already suggested the importance of the rights of emotionally disturbed children that are adversely affected by the classification. The Court below failed to consider the nature of these important rights or the governmental interest urged in support of the classification.

The differences suggested by the Court below to rationalize the classification of Browndale homes differently from foster homes have no relation and are contrary to the legitimate objectives of the Zoning Ordinance. The Wisconsin legislature delegated the power to enact zoning ordinances to the various county boards in Wisconsin. This enabling legislation contains an extensive list of permissible purposes for which zoning regulations may be enacted by the local authority.[13] The legislature, as evidenced by this enabling legislation, delegated to the county boards local control of land use development for the enumerated purposes of the statute.

---

[13]Section 59.97, Wisconsin Statutes (1971).

The concern of the Dane County Board in limiting the permitted use in an A-1 Agricultural District to a single family dwelling unit is evident from the definition of "single family dwelling"[14] and "family"[15] in the Ordinance. The residential and rural land use of the district would be destroyed if multi-unit or overcrowding uses were permitted. This is in accord with the general purposes outlined by the legislature.

The exclusion of emotionally disturbed children from a single family dwelling zone district is not a rational way to achieve these ends. Factually, there is no question that the use of the land by petitioner is the same in all respects to that use of the land by foster homes. Because of the important rights affected by this classification, the rationality of the classification to achieve the stated ends should have been subjected to strict scrutiny by the Court below. Instead, the Court below has erroneously applied the minimal scrutiny standard in passing on the rationality of the respondent Board of Adjustment's classification.

---

[14]Section 10.01 (18)(a), Dane County Ordinance (1971).

[15]Section 10.01 (19), Dane County Ordinance (1971).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the mandate of the Supreme Court of Wisconsin.

Respectfully submitted,

RICHARD C. GLESNER
ROBERT D. MARTIN
PAUL A. CROAKE

Counsel for Petitioner

Ross, Stevens, Pick &
Ross, S.C.
110 East Main Street
Madison, Wisconsin 53703

LIBRARY
SUPREME COURT, U. S.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents,

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

RICHARD C. GLESNER
ROBERT D. MARTIN
PAUL A. CROAKE
Counsel for Petitioner

Ross, Stevens, Pick & Ross, S.C.
110 East Main Street
Madison, Wisconsin 53703

OPINION OF SUPREME COURT OF WISCONSIN

No. 403

August Term, 1972

STATE OF WISCONSIN : IN SUPREME COURT

Browndale International, Ltd.,
a Canadian corp.,
Plaintiff-Respondent,

v.

Board of Adjustment for the
County of Dane, etc.,
Defendant-Appellant,

Town of Cottage Grove,
Intervenor-Appellant,

APPEALS from a judgment of the circuit court for Dane county: GEORGE R. CURRIE, Reserve Circuit Judge. Presiding. *Reversed.*

This is an appeal from a judgment entered on May 15, 1972, in the Dane County Circuit Court in a proceeding of review by certiorari reversing the March 17, 1972 decision of the Dane County Board of Adjustment. The board's decision had modified the Dane county zoning supervisor's determination that the homes proposed by the respondent were single family dwellings within the meaning of the Dane county zoning ordinance. The board stated that the purchase and use by Browndale International, Ltd., of certain single family residences in the town of Cottage Grove for the purpose of housing and caring for emotionally disturbed children do not fall within the meaning of a "single family dwelling" or a "single

family unit" as defined and used in the ordinance.[1] The board concluded that the "use" intended by Browndale requires "site approval" under sec. 10.12 (2) (c) of the ordinance. The circuit court held that such homes are single family dwellings if not more than five children reside therein; and if more than five children reside in such home then site approval is required.

The Board of Adjustment for the County of Dane and the Town of Cottage Grove appeal.

The facts will be set forth in the opinion.

BEILFUSS, J. Dane county, for zoning purposes, is divided into 13 districts. Sec. 10.02 (1), Ordinance. The district in question is an A-1 Agricultural District. Under sec. 10.12 (1) of the ordinance, certain "permitted uses" for an A-1 Agricultural District are enumerated. Site approval is not required. One such "use" is a "single family detached dwelling unit." Under sec. 10.12 (2) of the ordinance other enumerated uses are also permitted but only upon first obtaining site approval.

Sec. 10.01 (18) (a) of the ordinance defines a "single family dwelling" as: "A building designed for and occupied exclusively as a residence for one family." Sec. 10.01 (19) defines "family" as: "Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related, living together on the premises as a single housekeeping unit, including any domestic servants." The basic issue in this action is whether a Browndale therapeutic home falls within the meaning and definition of a single family dwelling unit. It if does then the homes can be located in the area in question without site approval.

---

[1] The supervisor had found that the therapeutic homes did.

The nature of the Browndale therapeutic home and its intended purposes (for the care and maintenance of emotionally disturbed children) first requires an understanding of what Browndale International, Ltd., is, its history and what is its purpose. John L. Brown is the founder and president of this Canadian corporation. Mr. Brown is a psychiatric social worker by profession. He has worked with emotionally disturbed children since 1944. For several years he worked at the Warrendale Institution in Ontario. Over the years the institution changed over to a family model treatment center. In 1966, Mr. Brown started his own privately operated Browndale program. This program branched out into the United States. The program's purpose is to treat the disturbed children in the community. The method centers around the concept of normalizing a child's lifestyle as much like a child who has been living with his own family. It is a therapeutic family concept of care which attempts to duplicate the family life.

Browndale International, Ltd., itself is not the corporation engaged in the direct care and maintenance of these emotionally disturbed children; nor it is licensed by the State of Wisconsin as a child welfare agency. Rather, a state licensed corporation called "Involvement Centers, Wisconsin, Inc.," (hereinafter Involvement Center or Center) provides the care and operates these homes. The Involvement Center is licensed under sec. 48.60, Stats., as a child welfare agency. The places of care provided for the children are referred to by the Department of Health and Social Services as "child welfare institutions" under its rules and regulations. The Involvement Center is a subsidiary or an affiliated corporation of Browndale International, Ltd.[2]/ The Involvement

---

2/ Browndale International, Ltd., will be referred to as "Browndale."

Center was incorporated in December of 1971 and consists of 15 stockholders, to wit: Browndale, Mr. Brown and his wife, two people from Arizona and Minnesota, two people from Ontario, and the senior staff of the Wisconsin operation.

The property in question consists of two adajcent pieces of land of about 182 acres located in an A-1 agricultural district in the town of Cottage Grove. This property is what precipitated the appeal. Browndale had contracted to purchase six homes located on this property. Of the six homes, one is already licensed and a permit was granted as of January of 1972. The reason Browndale contracted to purchase this property was so it could lease residences for profit to the Involvement Center. The Center intends to use the property for the purpose of establishing homes for "therapeutic families." It should be noted that Browndale is eventually planning to have 21 homes for 105 children in this state. There are already six homes in Dane county and another five homes are planned for the town of Cottage Grove. The number of children in each home varies from eight in the town of Fitchburg to four in the only home licensed and permitted in Cottage Grove. By contractual agreement, Browndale provides the facilities and furnishings for these buildings the Center leases. The rent per month depends on how many children are in each home unit. The amount varies from not less than $400 to not more than $1,000 per month. The lease provides that the Center pay all real estate taxes. The Center's source of income is a $37 fee for each child taken care of per day. The fee is paid by the county and the state. The one therapeutic home in Cottage Grove that is in "use" is not presently owned by Browndale. Rather, Browndale is renting the home from one Mr. Moe for $250 per month. Browndale then subleases it to the Center for $400 per month rent.

The initial operation for these therapeutic homes in Dane county began in September of 1971. The average stay for a child is fifteen months. The projected gross revenue for 1972 in Dane county (based on a planned 105 children in 21 homes) was somewhere between one to 1.3 million dollars. Mr. Brown testified that the net profit budgeted for the Browndale operation is estimated at three to six percent. But the record shows that the actual profit factor for 1972 turned out to be eight to 10 percent.

The emotionally disturbed children who are housed in these homes are either neglected, dependent or delinquent. The children are involuntarily placed in these homes by the juvenile court. The purpose is for treatment and rehabilitation. However, once the child is placed there he is not forced to remain. The child, if he desires, can be relocated elsewhere. The four children presently at the Cottage Grove home ". . . are the 1% of the most disturbed children in the State."[3/] The children need intensive and extensive care and treatment, and are under strict supervision. If they are able to, they attend area schools.

Each therapeutic home is staffed with the following personnel: Therapeutic parents who supervise the children and the program. They function as surrogates and are responsible for the child 24 hours a day. They do not live there. There are no set hours of work; rather, the hours put in depend upon the pattern of life-style they create for each home. Most importantly, the therapeutic parents are not supposed to identify to these children as their parents, nor act as

---

[3/] Mr. Brown testified that for some of these emotionally disturbed children it takes time before they become civilized. He added. ". . . You are trying to civilize them and teach them how to live in the community. . . ." Some children are very disturbed, difficult and suffer physical ailments.

substitutes for the biological parents, nor provide the children with a mother-father image. Mr. Brown's testimony is descriptive of their role:

> "Q. Do the children identify with the therapeutic parents? In other words, do they refer to them as a father image?
>
> "A. No, we don't use that because we have to remember that while we treat the child as though he were our own, because that is what he needs, he is not our own and we can't get back from him — he belongs to somebody else. He is somebody else's child, and so part of our work is to include the biological family as well. Now this is hard for most people to understand because we have been used to the idea that if their own family couldn't take care of a child, you gave the kid to somebody else to take care of and he was theirs. We don't operate that way. We say we will give the child what he needs without claiming him. Who should claim him are his biological kin.
>
> "THE COURT: How do these children refer to the therapeutic parents? What do they call them?
>
> "THE WITNESS: At the best times, John or Mary or Joe — at the worst times, profanities unmentionable, but they usually call them by their first name or nickname. There are times when a child will feel very, very close to a person and very, very tender and then he might refer to mom or dad, but we don't encourage it because what we are trying to do is not to provide a substitute for the child, we are trying to provide an experience, a human experience, so that he can go back and live with his own and so we contact his family and we work with his family in such a way that the child sees them as the parents."

In addition to the therapeutic parents, other staff members are employed to assist them. An individual is hired to cook and clean, and another to supervise the children at night.

A social worker and a nurse are assigned to the house. The nurse is the only part-time employee. The social worker and nurse may work at one or more houses depending upon the problems and experiences encountered with such houses.

The salaries of the personnel for the Cottage Grove home are paid in part by both Browndale and the Center. A weekly allowance is also given to the Cottage Grove home in the amount of $4 per child per day. This money is used for food, clothing and miscellaneous household expenses such as Kleenex, non-grocery items, etc. The two therapeutic parents receive a minimum of $125 each per week, plus all health and medical group insurance and 40 days of vacation each year. The night supervisor and the individual who cooks and cleans receives $1.60 per hour, and works from 36 to 48 hours per week. The nurse receives $225 to $250 per month. The social worker receives $10,000 per year. An extra staff is hired to handle any potential crisis at the home or to substitute for a staff member. This "extra staff" receives $135 per week. A medical doctor and psychiatrist are on call and receive $20 to $30 per hour when needed. The general personnel for Browndale and the Center are: (1) A program developer who sets up these homes and receives $10,000 per year; (2) an assistant-director who is available for training and teaching and who receives $12,000 per year; (3) a staff supervisor who receives $130 to $135 per week; and (4) an assistant-director who receives $15,000 per year. Mr. Brown does not receive a salary but he derives his income from the stock investments in Browndale and the Center.

Neither Browndale nor the Center are licensed as foster homes, and only the Center is licensed as a child welfare agency. Mr. Brown testified that prior to January of 1972 the therapeutic family was treated by the state as a foster home,[4]/ while the city of Madison treated the three homes located there as boarding houses. Site approval was not needed. The homes were run by licensed foster parents who rented from Browndale. Shortly thereafter the city of Madison changed its definition of "uses" under its ordinance. Site approval was then needed. The state also decided that the Centers should be licensed as child welfare agencies since they provided care and maintenance for more than four children.[5]/ There were several reasons stated why that licensing category was made. The Involvement Center planned to provide care and maintenance for 105 emotionally disturbed children in 21 homes in Dane county; five home facilities were already in existence by January of 1972. The state determined that sec. 48.60, Stats., compelled the Center to be licensed as a child welfare agency. Browndale agreed to this because then it could receive a federal grant which was not available to licensed foster homes. The Involvement Center, licensed as a child welfare agency, gave the Center its own autonomy.

---

[4]/ Under ch. 48, Stats., there are three categories of licensing classifications, to wit: (1) Foster homes, sec. 48.62; (2) child welfare agencies, sec. 48.60; and (3) day care centers, sec. 48.65. These are all under the authority of the Department of Health and Social Services.

[5]/ Sec. 48.60 (1) and (2) (e), Stats., provides: "*Child welfare agencies licensed.* (1) No person shall receive children with or without transfer of legal custory, to provide care and maintenance for 75 days in any consecutive 12 months' period for 4 or more such children at any one time unless he obtains a license to operate a child welfare agency from the department.

"(2) This section does not include: . . . (e) A licensed foster home."

Sec. 48.62 (1), Stats., provides: "*Foster homes licensed.* (1) No person shall receive, with or without transfer of legal custody, any child to provide care and maintenance for that child unless he obtains a license to operate a foster home from the department or from a county agency or licensed child welfare agency as provided in s. 48.75."

The Center would be able to control its own intake and resources for hiring personnel, purchasing facilities and for the care and treatment of the children. In contrast, if licensed as a foster home the Browndale therapeutic homes would remain under the direct and exclusive supervision, control and responsibility of the department. The foster children must then reside with the foster parents in the latters' home. Also, in foster homes the foster parents must be licensed, the parents must live at the home, and such parents must provide specified care in a specified location for a specified period of time under specified conditions. Further, one cannot substitute for a foster parent without the department's expressed permission.

Finally, the record substantiates the fact that Browndale homes have continued to operate the same way before and after its child welfare classification. The therapeutic homes do not operate like or on a large scale institutionalized level such as Mendota State Hospital.

The first issue is whether the circuit court exceeded its jurisdictional scope of review by certiorari.

Both the appellant and the intervenor-appellant contend that sec. 59.99 (10) through (13), Stats., limits the court's review by certiorari. They argue that the circuit court could not go beyond the record, nor can it consider the matter *de novo*. It is argued that the court's review was limited only to the question of whether the board was within its jurisdiction and not based upon an error of law.

Sec. 59.99 (1) through (13), Stats., provides:

> "(10) *Court Review*. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department,

board or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board.

"(11) *Certiorari.* Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment, and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

"(12) *Return to Writ.* The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

"(13) *Court Decision.* If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

We believe the appellant and the intervenor-appellant miscontrue sec. 59.99, Stats. The statute is explicit on its

face. The court, in its discretion, can take additional testimony and other evidence and make findings of fact and conclusions of law. The court then may ". . . reverse or affirm, wholly or partly, or may modify the decision brought up for review." This is exactly what was done in the case under sub. (13). The court did not exceed its scope of review. The statute allows the court to take additional evidence and make additional findings of fact and conclusions of law.

Notwithstanding this statutory pronouncement, the appellants argue that what the statute says is not what it really means. For support they point to this court's decisions in *State ex rel. Morehouse v. Hunt* (1940), 235 Wis. 358, 291 N.W. 745, and *State ex rel. Conn v. Board of Trustees* (1969), 44 Wis. 2d 479, 171 N.W. 2d 418. In *Hunt* the court stated at page 367:

> "The case is *certiorari.* When *certiorari* is invoked to review the action of an administrative board, the findings of the board upon the facts before it are conclusive if in any reasonable view the evidence sustains them. *Wisconsin Labor R. Board v. Fred Rueping L. Co.* 228 Wis. 473, 493, 279 N.W. 673. Under this rule the appeal board's view of the facts, so far as they appear from its decision, must be accepted as final and conclusive upon the trial court and upon us. The statutory provision for review by *certiorari* of the board's action, to the effect that the court may take further evidence and may consider it in reaching its determination, may warrant the court's overriding the board's findings of fact if the additional evidence received shows them to be erroneous, but where as here the additional evidence is incompetent it cannot be given that effect however it might be if it were competent. . . ."

In *State ex rel. Conn, supra,* the court stated at page 482:

> "(2) Where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued. (Citing *Essock v. Cold Spring* (1960), 10 Wis. 2d 98, 102 N.W. 2d 110.)
>
> "(3) In a certiorari case the court is not allowed to consider matters outside the record. (Citing *State ex rel. Kaczkowski v. Fire & Police Comm.* (1967), 33 Wis. 2d 488, 148 N.W. 2d 44, 149 N.W. 2d 547, and other cases.)
>
> "(4) Before a court will grant the writ, it must appear that (a) there has been some error committed; (b) the error has caused substantial harm; and (c) the plaintiff has not been guilty of laches in seeking his remedy. (Citing *State ex rel. Damerow v. Behrens* (1960), 11 Wis. 2d 426, 105 N.W. 2d 866; *Consolidated Apparel Co. v. Common Council* (1961), 14 Wis. 2d 31, 109 N.W. 2d 486.)"

Contrary to appellants' position, both cases are clearly distinguishable and have no application to the scope of review by statutory certiorari. The *Hunt* decision was based on the interpretation of ch. 62 on Cities, sec. 62.23 (8) (b) and (i), Stats. 1939. Sec. 62.23 (8) (i)[6] only states that the court shall make a determination but to ". . . reverse or affirm, wholly or partly or . . . modify the decision brought up for review." *Hunt* dealt with a review from a decision by the board of appeals established by the city council. In this case the review is from the Board of Adjustment which is a distinct and separate statutory entity. *Hunt* dealt with an interpretation of

---

[6] Sec. 62.23 (8) (i), Stats. 1939, provided: "Said court may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith."

a different statutory scope of review; the *Hunt* decision itself recognized the court can override the board's findings of fact if additional evidence shows the board's findings to be erroneous.

State ex rel. Conn, supra, also is not applicable. In that case, review by certiorari did not allow the court to consider matters outside the record. In this case the court can go outside the record to take additional evidence to make findings of fact and conclusions of law. Sec. 59.99 (13), Stats. *State ex rel. Conn, supra,* was decided on the basis of laches. This is not an issue here.

The appellants argue that this has somehow all been changed by this court's decision in *Buhler v. Racine County* (1966), 33 Wis. 2d 137, 146 N.W. 2d 403, when review by certiorari is sought from a decision by any zoning authorities. This court in *Buhler* stated, at pages 146, 147:

> "We do not hold the trial court was without jurisdiction to hear this case. We have held, and other jurisdictions have generally held, courts have power to grant relief against zoning when it is unconstitutional, unreasonable or discriminatory. Courts can determine whether a zoning ordinance is a valid exercise of the police power, is within the limits of public necessity, and bears a substantial relationship to public purposes of health, safety or welfare. In some cases courts have reviewed zoning classifications to determine whether a classification of uses was fair and reasonable or arbitrary. *Smith v. Brookfield* (1956), 272 Wis. 1, 74 N.W. (2d) 770. In other cases, courts have inquired into the scheme of classification to see if it is applied fairly and impartially in a given case. *State ex rel. Humble Oil & Refining Co. v. Wahner* (1964), 25 Wis. (2d) 1, 130 N.W. (2d) 304; *Geisenfeld v. Shorewood* (1939), 232 Wis. 410, 287 N.W. 683; *Rowland v. Racine* (1937), 223 Wis. 488, 271 N.W. 36; *State ex rel.*

Tingley v. Gurda (1932), 209 Wis. 63, 243 N.W. 317; 8A McQuillin, Mun. Corp. (3d ed., 1965 rev.), p. 263, sec. 25.277.

"However, since zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law. Consequently, although a court may differ with the wisdom, or lack thereof, or the desirability of the zoning, the court, because of the fundamental nature of its power, cannot substitute its judgment for that of the zoning authority in the absence of statutory authorization. This rule applies not only to the necessity and extent of zoning but also to rezoning, classification, establishment of districts, boundaries, uses, and to the determination of whether or not there has been such a change of conditions as to warrant rezoning. . . ."

Two factors distinguish this case. The *Buhler* decision did not deal with the issue of the "scope of review by statutory certiorari." Statutory certiorari and common-law certiorari are two different things. *Lakeshore Development Corp. v. Plan Comm.* (1961), 12 Wis. 2d 560, 107 N.W. 2d 590. A basic issue in *Buhler* was whether a court even has jurisdiction to grant review against zoning ordinances when it is alleged that they are unconstitutional, unreasonable or discriminatory; and then what is the limit of the court's review. Most importantly, *Buhler, supra,* recognized that a court's review, a court's judicial interference, and a court's power to substitute its judgment is limited but only "in the absence of statutory authorization." In this case statutory authorization clearly exists.

This court's decisions in *Lakeshore Development Corp. v. Plan Comm., supra,* and *State ex rel. Casper v. Board of Trustees* (1966), 30 Wis. 2d 170, 140 N.W. 2d 301, not only further negate appellants' position but also help to clarify the apparent confusion between common-law ceritorari and statutory certiorari. In *Lakeshore Development Corp.*, this court stated at page 565:

> "The writ of certiorari at common law was limited in scope and a motion to quash, either before or after the return to the writ was made, usually raised only questions of jurisdiction or excess power set forth as errors in the petition although other errors might appear in the return. Ferris, Extraordinary Legal Remedies, p. 204, sec. 178. The return was taken as conclusive if responsive to the petition and could not be impeached by collateral affidavits. After the return was made the court could dismiss or quash the writ or enter a judgment of affirmance.
>
> "The scope and purpose of the writ of certiorari has been enlarged by statute and it is now used as a method of appeal to determine not only the jurisdiction of a municipal board or agency but also to review the action of such a board as arbitrary, unreasonable, or discriminatory and sometimes to decide the merits of the action. . . ."

In *State ex rel. Casper, supra,* the court stated at pages 175, 176:

> "We point out again . . . that a review by a writ of certiorari has different characteristics than the common-law writ of certiorari. The latter writ is granted in the discretion of the court, *Consolidated Apparel Co. v. Common Council* (1961), 14 Wis. (2d) 31, 109 N.W. (2d) 486, while the statutory review by certiorari is a matter of right and a proceeding which is much enlarged in scope

> because it inquires into not only the jurisdiction of the board or body making the determination but also the merits of the determination. . . ."

The trial court here did not err by taking additional evidence and basing its findings of fact and conclusions of law, at least in part, upon such evidence.

The trial court concluded as a matter of law that a Browndale home in which not more than five emotionally disturbed children resided, as described in the findings of fact, qualifies as a single family dwelling under the zoning ordinance and requires no site approval. The appellants, the Board of Adjustment and the Town of Cottage Grove, contend this is error.

Respondent first maintains that the trial court's decision should be affirmed since the circuit court's findings of fact are not against the great weight and clear preponderance of the evidence. This position would be sound if only a question of fact was presented to this court on review. In *Boutelle v. Chrislaw* (1967), 34 Wis. 2d 665, 673, 150 N.W. 2d 486, this court stated it is ". . . not bound by a finding of the trial court which is based upon undisputed evidence when that finding is essentially a conclusion of law. . . ." The basic issue here is an interpretation of an ordinance. This is a question of law. True, the evidence conflicts as to whether Browndale therapeutic homes prior to January 1, 1972, were ever treated and licensed by the state as foster homes. But this is only a collateral fact in dispute. It is not controlling as to the issue of whether these therapeutic homes are now single family dwellings within the meaning of the ordinance after the Involvement Center became a licensed child welfare agency. What is also critical

is that much of the conflicting trial testimony went to the issue of interpreting and construing the terminology in the ordinance and the Department of Health and Social Services' rules governing foster homes and child welfare agencies. This conflict in testimony on how to interpret the law does not change the texture of the issue from law to fact. All the material facts that make up the nature and operation of these therapeutic homes are undisputed. Accordingly, an issue of law, not fact, is presented.

The question then is whether these therapeutic homes are single family dwellings within the meaning of the ordinance. To resolve this issue both the appellants and the respondent rely heavily on this court's decision in *Missionaries of La Salette v. Whitefish Bay* (1954), 267 Wis. 609, 66 N.W. 2d 627. In that case certain basic rules of construction were pronounced, to wit, at pages 614, 616, 617, 618:

> "Restrictions contained in zoning ordinance must be strictly construed. A violation of such ordinance occurs only when there is a plain disregard of its limitations imposed by its express words. . . .
>
> ". . .
>
> "It is not within the court's province to add or detract from the clear meaning that the village board has expressed in its own definition of the word 'family.' . . .
>
> ". . .
>
> "The construction of the ordinance under the facts of record is a question of law. [Case cited.]
>
> ". . .
>
> "This court has refused to apply a literal construction of a zoning ordinance in several cases, stating: 'Although the letter of the ordinance is as stated the letter need not necessarily be applied. [Case cited.] "The letter killeth but the spirit giveth life." ' [Case cited.]

"Ordinances, like statutes, are to be construed according to their intent.[Case cited.]"

Although admittedly a close question, we are of the opinion that Browndale therapeutic homes are not single family dwellings. These therapeutic homes are not "occupied exclusively as a residence for one family" under sec. 10.01 (18) (a) of the ordinance. First, Browndale's purpose is commercial. This foreign corporation is in the sole business of buying property with homes located on it for the purpose of leasing such homes for profit to Involvement Centers as care facilities.7/ Respondent argues that such a factor is immaterial, but this argument only attempts to avoid the issue. The commercial aspect is very relevant to the actual use of the homes, especially when Browndale intends to lease six homes on a 182 acre plat site. Six therapeutic care facilities located in one concentrated area are more in truth a colony of homes for the care and treatment of emotionally disturbed children. In fact, such a concentrated group of therapeutic homes would be much the same as one large institutional complex of buildings on property which cared for 30 children. Such a concentration of homes could very well defeat Mr. Brown's philosophy of integrating small groups of children into the community area in order to duplicate family life style. The use of the premises is not even principally for residential living purposes. Rather, its primary use is to provide care and treatment for emotionally disturbed children. A staff is hired expressly for this purpose. The children in these therapeutic homes just do not

---

7/ It must be remembered that Browndale admitted this in its petition for review, and it also stated that it was not engaged in the business of caring for emotionally disturbed children.

merely live upon the permises, they are there primarily for rehabilitation and treatment. Duplicating the family life style is only one of the elements of rehabilitation. Other elements such as psychiatric and medical care and strict supervision are also essential ingredients. The therapeutic home "arrangement" is substantially different than a group of priests, nurses, school teachers, students or others who acquire premises to use as a residence for a group. The Board of Adjustment's decision had a substantial basis in fact when it found that the intended meaning of a "single family dwelling" does not include care and treatment homes for emotionally disturbed children. This is especially true when one looks at the fact that six therapeutic homes are planned to be colonized in one site area.

We believe that the use and occupancy of the premises by therapeutic care centers as a single family dwelling not only defeat the zoning ordinance's intent but they also disregard the limitations imposed by the express words of the ordinance — "occupied exclusively as a residence for one family."[8]

If it were not for the extensive staff which manages, directs and controls these children, the homes would cease to exist.

The question then is what classification of "uses" do these homes fall under, and where can the homes be located? As the record points out, the Board of Adjustment classified these therapeutic homes as the "type of use" covered under sec. 10.12 (2) (c) of the ordinance. Sec. 10.12 (2) (c) allows

---

[8] Sec. 10.01 (18) (a) of the ordinance.

permitted uses subject to site approval for "extended care facilities," [9] but respondent argues that such homes are not extended care facilities and to interpret therapeutic homes as such thwarts their purpose. Even if these are not extended care facilities, the Board of Adjustment has the statutory power under sec. 59.99 (7) (b), Stats., to grant ". . . special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance." The board also has the power and authority under sec. 59.99 (7) (c) to grant in ". . . specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, . . ." The fact that the board has already allowed one therapeutic home in this disputed district in the town of Cottage Grove evidences this. It cannot be reasonably said that the board is attempting to thwart this method of care and treatment for emotionally disturbed children. The board has expressed no objection to the therapeutic home idea but only justifiably refused to interpret the therapeutic home as a single family dwelling — especially in light of Browndale's commercial attempt to colonize six homes in one site area under the guise of designating them as single family dwellings. It is apparent that Browndale does not want to be forced to obtain site approval for the six therapeutic homes planned to be colonized on the 182 acre area. The minutes of the board meeting indicate that this was one of the major disputes.[10]

---

[9] Miss Nina Neupert, a social worker for the Department of Health & Social Services, testified the care was "intensive" and "extensive."

[10] In the Minutes of the board meeting it was also brought out that Mr. Brown not only intended to have six homes on the 182 acre site but also had originally planned to build 20 more units. Supposedly this plan to build 20 more home units was abandoned.

The respondent argues that a therapeutic home is no different than a foster home. In particular, it is maintained that: (1) Therapeutic homes can qualify as foster homes; (2) that there is no substantive difference between the two homes; (3) that the homes provide the same type of services; and (4) both homes are really one and the same. Therefore, it is maintained that therapeutic homes are being denied their Fourteenth Amendment right to equal protection under the law since foster homes are a permitted use as a single family dwelling unit.

The constitutionality of the state's general power to zone property is founded in the public interest. The state's police power may be delegated by it to the cities and counties. Like other regulations under the police power, ". . . a specific zoning ordinance must meet the constitutional demands of due process and the equal protection of the law. . . ." *State ex rel. Wis. Lutheran High School Conference v. Sinar* (1954), 267 Wis. 91, 95, 65 N.W. 2d 43, case dismissed 349 U.S. 913, 75 Sup. Ct. 604, 99 L. Ed. 1248. In *Sinar* the court also stated, at pages 95, 96:

> ". . . It must '. . . provide those in similar circumstances, among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes.' . . .
>
> ". . .
>
> " '. . . a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object, act, or persons in respect to which it is proposed.' . . ."

In *Scharping v. Johnson* (1966), 32 Wis. 2d 383, 396, 145 N.W. 2d 691, the court stated:

" '. . . classifications of persons or property must be based upon reasonable differences or distinctions which distinguish the members of one class from those of another in respects germane to some general and public purpose or object, of the particular legislation.' *Christoph v. Chilton* (1931), 205 Wis. 418, 237 N.W. 134.

"In *Madison Metropolitan Sewerage Dist. v. Committee* (1951), 260 Wis. 229, 253, 50 N.W. (2d) 424, we stated that:

" 'The question of classification is primarily for the legislature, both as to need and basis. . . . All that seems to be required is that there must be some reasonable basis along general lines for the adoption, all reasonable doubts to be resolved in favor thereof. . . .' "

The respondent has made a forceful argument that therapeutic homes appear to be no different than foster homes. These two types of homes have substantial differences that permit separate reasonable classifications. Therapeutic homes are not being denied equal protection of the law under the the zoning ordinance. There are relevant distinctions between foster homes and therapeutic homes. Mr. Brown testified that therapeutic parents and therapeutic homes are not substitutes for the biological parent or home. Foster parents and foster homes are an attempt to be almost a complete substitution. The foster parents' role is "*in loco parentis.*" Children in foster homes are not necessarily delinquent, dependent nor neglected. The foster home's main emphasis is not rehabilitation. In contrast, therapeutic homes described herein accept types of severally emotionally disturbed children for the purpose of rehabilitation. Foster homes are not financial enterprises; the attempt is only to render a service. This cannot be said about Browndale or its affiliated Involvement Center in their ownership and management of therapeutic homes. Therapeutic homes are under the control of the Department of Industry, Labor and Human Relations' building code.

The home facilities must meet fire regulations, plumbing regulations, etc., and such homes are inspected and treated differently than the regular residence or foster home. Foster homes try to duplicate the biological family. Therapeutic homes only try to duplicate the family life style. For instance, the foster child lives and sleeps with the foster parent at the foster home. This is not true for the therapeutic home. The therapeutic parent does not live or sleep there but rather works at such home. If married, both spouses are required to apply for a foster parent license. The foster parent and not the home is licensed. In the therapeutic home the house must be licensed, but the therapeutic parent need not be. The foster parent and foster home remain under the direct control, supervision and responsibility of the H&SS Department. The foster parent must enter into a contractual agreement with the department. Not so for the therapeutic home because as a child welfare agency it is autonomous. The therapeutic home is not under the same type of control at all, nor is the therapeutic parent under a contract with the department. Mr. Brown testified that the therapeutic home concept is not explicitly aimed at avoiding the notion of institutions. The foster home is in no way related to institutionalization. Foster homes cannot have more than four children without the express permission of the department. Therapeutic homes have no numerical limitation as to the number of children it can care for and treat in one home. Secs. 48.60; 48.62; and 48.64 (3), Stats. PW-CY 40.62 (2) (g) talks specifically about foster children sleeping in a "single family dwelling" with the foster parent. Sub. (2) (e) states a foster child cannot sleep in any building.

apartment, or other structure which is separate from the family home. There is no such specific limitation for therapeutic homes. Lastly, from the above differences it can be reasonably said that foster homes constitute a "family" under zoning laws even before any child is placed with the foster parent. As appellants correctly point out, ". . . The residential character of a foster home does NOT depend upon the foster child. . . ." This cannot be said for Browndale therapeutic home facilities.

These enumerated distinctions show beyond reasonable doubt that foster homes have a fair, substantial, natural, reasonable and justifiable classification not in violation of constitutional equal protection. The Board of Adjustment could reasonably conclude, under a rational construction of the zoning ordinance, that the Browndale-type therapeutic homes did not come within the ordinance definition of a family and that several of them within a limited area were inconsistent with the intention and purpose of the zoning ordinance. The board in determining that Browndale homes would not be permitted in the A-1 residential zone without prior site approval acted reasonably and within its jurisdiction.

The respondent contends that since both the appellant and the intervenor-appellant failed to include an adequate abridgement of the trial testimony in their appendices as required by sec. 251.34 (5) (c), Stats., the court should impose double costs, assume that the evidence supports the trial court's findings and affirm the case without opinion. Intervenor-appellant argues that there was adequate compliance with sec. 251.34 (5) (a), (b), (c) and (d), when its appendix and appellant's are read together.

The defendant-appellant, The Board of Adjustment for the County of Dane, only sets forth the memorandum decision, the findings of fact, conclusions of law and judgment in its appendix. The intervenor-appellant, Town of Cottage Grove, in its appendix, provided four pages of abridged testimony from a transcript of testimony in excess of two hundred pages. The respondent did prepare and submit a substantial and helpful abridgement of the testimony.

It is clear that appendices of the appellants do not comply with sec. 251.34 (5) (c), Stats., which require an abridgement of the trial testimony.

The court, although it was inconvenienced by a lack of a proper appendix, was able to determine the facts from the transcript, the respondent's appendix, and the excellent and comprehensive memorandum opinion filed by the trial court. Because of the public importance of these matters the case could not be affirmed without opinion, but because of the failure of the appellants to adequately comply with sec. 251.34 (5) (c), Stats., the court will not allow costs on this appeal. Sec. 251.38 (2).

By the court. — The judgment of the circuit court is reversed and cause remanded with directions to affirm the decision of the Board of Adjustment for Dane County.

MEMORANDUM DECISION OF WISCONSIN CIRCUIT COURT

STATE OF WISCONSIN — DANE COUNTY
CIRCUIT COURT

BROWNDALE INTERNATIONAL, LIMITED, a Canadian corporation,
Petitioner,

Case No. 135-488

vs.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, consisting of MILLARD ERICKSON, OSCAR HOLTE, and HARLAND DAHLK,
Respondent,

and

TOWN OF COTTAGE GROVE
Intervener.

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is an action in certiorari to review the decision of the respondent Board of Adjustment (hereafter the "Board") rendered March 17, 1972, interpreting portions of the Dane County Zoning Ordinance. By order dated April 28, 1972, the Court denied the respondent Board's motion to quash or supersede the writ of certiorari. In the Court's memorandum decision rendered with respect to the motion to quash or supersede, the Court set the hearing on the merits for May 4, 1972, and therein stated that pursuant to Sec. 59.99 (13), Stats., the Court would hear such relevant and competent evidence as the parties desired to present at the hearing. The

hearing commenced as so scheduled on May 4th and the taking of testimony extended throughout that day and into the morning of May 5th.

The controversy sought to be resolved in this litigation is what provisions of the Dane County Zoning Ordinance (hereafter "ordinance") are applicable to the "Browndale" type of therapeutic family home for emotionally disturbed children, (hereafter "Browndale home(s)"), as exemplified by the six of such homes now being operated in Dane County by Involvement Centers, Wisconsin, Inc., (hereafter "Involvement Centers") lessee of petitioner Browndale International, Limited (hereafter the "petitioner corporation").

The decision of the Board of March 17, 1972, essentially was: (1) these Browndale homes do not qualify as a "single family dwelling" as that term is defined by Sec. 10.01 (18) and (19) of the ordinance; (2) such homes are of a type of use that falls within the category of institutions listed in Sec. 10.12 (c) of the ordinance and, therefore, require site approval; and (3) the petitioner corporation was ordered to desist from operating such homes in the Town of Cottage Grove until site approval had been obtained from the Dane County Zoning Committee. The correctness of this interpretation of the ordinance is what is being challenged in this action.

STATEMENT OF FACTS

The president of petitioner corporation is John Brown. Brown is a psychiatric social worker by profession. His education in this field consisted of two years of work at the University of Minnesota followed by two years at the University

of British Columbia where he received his B.A. degree in social work. He then took work in advanced social (work) administration at the University of Chicago and received an M.A. degree from that university in arts and social (work) administration. He has worked with socially disturbed children since 1944.

For some years he was employed at Warrendale, an institution in Ontario, which, when he went there, was operating a congregate type of institution for emotionally disturbed children. Over the years Warrendale changed over to a family model treatment center. In 1966 Brown started the privately operated Browndale program, commencing in Ontario and then branching out into the United States. There are now fifty Browndale homes being operated in the United States and Canada.

The guiding principle of the Browndale home is to duplicate as nearly as possible what a child living in such a home would get if living with his own family. It has been found that the emotionally disturbed child needs an intimate tie to someone else. In a Browndale home this need is sought to be met through the small group of children he is associated with in the home living together as a family. The children in these homes are of different ages and sex as this makes for a more harmonious relationship. Each home is staffed with "therapeutic parents", a man and a woman, preferably in their twenties, who have a sense of maturity and concern for children. Meals are prepared and served as they would be in any private family.

In the six Dane County Browndale homes the largest number of children housed in one home is eight and the

smallest is four, being the one operated in the Town of Cottage Grove. The "model" number is five. In addition to the therapeutic parents each home is staffed by an employee who does the cooking and housework and a lady who comes in and stays with the children at night. No staff member sleeps on the premises, only the children. In addition Involvement Centers has nurses and social workers in its employ who visit the homes and has contracted with a psychiatrist and a pediatrician to supply service as needed for an hourly charge.

Each Browndale home is housed in a private dwelling the exterior of which is no different than other private homes in the neighborhood. No signs are erected on the premises or affixed to the home to indicate that is it a home for emotionally disturbed children.

All children in the Browndale homes in Dane County are placed there as a result of juvenile court proceedings. Their maintenance of $37 per day is either paid by the State or by some county. The present six homes in Dane County are inadequate to meet the referrals from the State and there is a present waiting list of 19 children. It is projected that the operation in Dane County will have 100 to 105 children by the end of 1972.

The average period a child stays in a Browndale home is two years and 90 per cent of those discharged are rehabilitated so as to be able to return to their families or make their way in life. This is a much higher percentage than has been achieved by child welfare institutions operated on an institutional basis. No child is kept in a Browndale home against his will and he is transferred elsewhere when he expresses a desire to leave.

The Court was much impressed by the testimony of Miss Nina Neupert, a social worker employed by the Division of Family Services, Wisconsin Department of Health and Social Services. (When "department" is hereinafter used it generally refers to the Division of Family Services, of the Department of Health and Social Services.)

Miss Neupert is familiar with the operation of the Browndale homes by Involvement Centers in Dane County as she has visited four of them. Furthermore, she went to Ontario and worked three days in a Browndale home as a social worker. She termed the Browndale home a "very dramatic departure" from the traditional child welfare institution. She would not classify a Dane County Browndale home as an "institution" for many reasons. Among these reasons is that there is no lump care of children in one building or unit, and no serving food in the institutional manner. Some Wisconsin "child welfare institutions" have private cottages in which the children sleep but are operated on an institutional and not a family basis. Furthermore, the care provided the children in a Browndale home is much more than supervision. No child that the department through her has placed in such a home has ever run away.

Of the six Browndale homes operated in Dane County three are in the City of Madison; one in the Town of Fitchburg near Verona; and one in the Town of Christiana near Cambridge; and one in a leased dwelling in the Town of Cottage Grove. The first of these was established in September., 1971. Up until January 1, 1972, the department licensed them as "foster homes," under Sec. 48.62, Stats., the licenses, however, not being issued to petitioner corporation (Involvement Centers not yet having been incorporated),

but to the therapeutic parents of each home. The department then determined that these homes should not be licensed as foster homes but that the corporation operating them should be licensed as a "child welfare agency" under Sec. 48.60, Stats. John Vick, agency licensing supervisor, explained in his testimony the reason for this change in licensing. It was necessitated in his opinion because some Browndale homes had more than four children housed in them and he had concluded that, inasmuch as more than one agency placed children in the homes, no exception to have more than four so housed could be granted.

The Court deems that Vick was correct in this conclusion. Sec. 48.64 (3), Stats., provides that not more than four children may be placed in a foster home unless all are in the relationship to each other of brother or sister or unless the department in accordance with its rules makes an exception. Rule PW-CY 40.64 (3) (a) of its Rules for Licensing Foster Homes provides, as a requirement for granting an exception to the four unrelated children maximum, that the foster parents shall contract in writing for the exclusive placement of children in their home by or through one agency. PW-CY 40.64 further provides that in no instance will the department make an exception for more than eight unrelated children in one foster home.

Vick further testified that under the statutes (Sec. 48.67 (1)) the department is authorized to license only three categories of child welfare facilities: (1) foster homes; (2) child welfare agencies; and, (3) day care centers. Having ruled out the applicability of the foster home classification, the only other category which possibly would fit is child welfare agency. Without a license, the Browndale homes could not

operate because Sec. 48.60, Stats., prohibits any person from providing care and maintenance for 75 days in any twelve month period for four or more children without a license. PW-CY-40.51 (1) requires every child welfare agency to be incorporated. No distinction is made between corporations for profit, such as Involvement Centers, or charitable or religious corporations. The department's Rules for Licensing Child Welfare Institutions, PW-CY-40.50 (e) 7, defines a "child welfare institution" as "a child welfare agency which regularly provides care and maintenance for children within the confines of its building". Thus each Browndale home operated by Involvement Centers is a child welfare institution.

On January 28, 1972, the department issued a provisional license to Involvement Centers which had been incorporated late in December, 1971, as a child welfare agency, to operate the five Browndale homes it was then operating in Dane County. (See Exhibit 1.) Later the home at Cottage Grove was leased and the license was amended to include that. The license specified the maximum capacity of each home. None specified a capacity in excess of eight and one of the Madison homes had a specified maximum capacity of five. This maximum capacity was based upon the maximum child sleeping facilities each home provided.

On December 8, 1971, Peter J. Miller, owner, accepted petitioner corporation's written offer to purchase an 80-acre farm in the Town of Cottage Grove having three one family residences upon it (Ex. 8). Thereafter, on January 22, 1972, Lloyd W. Moe, owner, accepted petitioner's written offer to purchase three parcels of land, each having on it a private family dwelling house, in the Town of Cottage Grove. (Ex. 7).

Each offer to purchase contained certain conditions upon which the offer was conditioned. Two of those conditions are here material:

> "Licensing for purchaser's special use by the Wisconsin Department of Welfare" . . . "approval from municipality, county or state, whichever governmental agency has jurisdiction for purchaser's special use of this property under proper zoning."

The "special use" referred to in the last stated condition is the operation of Browndale homes by Involvement Centers, lessee of petitioner corporation.

One of the homes covered by the offer to purchase to Moe had been leased to petitioner's corporation and the Browndale home operated in the Town of Cottage Grove is operated in that home. It is petitioner corporation's intention to lease the other five homes covered by these offers to purchase to Involvement Centers for the same purpose if the licensing and zoning hurdles mentioned in the above quoted two conditions are surmounted.

The ordinance classifies Dane County into these use districts: R-1, R-2, R-3, and R-4 Residence Districts; B-1 Local Business District; RH-1 Rural Homes District; A-1 Agricultural Districts; C-1 Commercial and Light Manufacturing Districts; C-2 Commercial and Light Manufacturing Districts; M-1 Industrial Districts; CO-1 Conservancy Districts; and Re-1 Recreational Districts. The six homes which petitioner has contracted to purchase in the Town of Cottage Grove are located in an A-1 Agricultural District. The ordinance specifies permitted uses in each use district. Sec. 10.16 (1) (a) provides, "Except as otherwise expressly provided, any use listed as a permitted use in any district shall be construed as a prohibited use in a more restricted district."

Sometime in January, 1972, Attorney Glesner, representing petitioner corporation and Involvement Centers, consulted with Lavern J. Enger, Zoning Supervisor, regarding what, if anything, had to be done under the ordinance in order to operate Browndale homes in the five other homes under contract of purchase in the Town of Cottage Grove. Enger ruled that inasmuch as foster homes had been permitted under the single family dwelling use in residential districts, and Browndale homes had previously been licensed to operate as foster homes by the department, it made no difference that these homes were now licensed as a child welfare agency or institution because neither foster homes nor child welfare institutions were specifically covered by the ordinance. Therefore, it was Enger's interpretation that no affirmative steps had to be taken under the ordinance in order for the five proposed Browndale homes to be operated in the A-1 Agricultural District in the Town of Cottage Grove.

The Town of Cottage Grove officials and one Graffin learned of this interpretation by Enger and appealed therefrom to the Dane County Board of Adjustment, the notice of appeal being dated February 9, 1972. A public hearing was held before the Board on March 10, 1972, at which the town was represented by Attorney Lloyd Schneider and petitioner corporation was represented by Attorney Glesner. At this hearing Enger's interpretation appealed from was presented in writing dated March 10, 1972, signed by him, and constitutes Document No. 4 attached to the Board's filed return to the writ of certiorari. The essential gist of the Board's decision on this appeal has heretofore been set forth herein.

One further development should be noted although the Court does not deem it has any material bearing on the legal issues confronting it in this action. Some citizens of the Town of Cottage Grove, including State Representative Everson, protested over the phone to the department about locating more Browndale homes in the town. On March 23, 1972, as a result of such protest, Vick, Edward Buehler, Regional Director of the Family Services Division, and two other officials of the department met on the evening of March 23, 1972, at the Firehouse in Cottage Grove with 25 to 35 town citizens. Those who spoke voiced opposition to additional Browndale homes being located in the town, except that some stated they didn't object to one additional home being located there.

After this meeting of March 23rd Buehler, Vick and two other Department representatives held a meeting with Brown and two of his associates on April 18, 1972, and informed them of their decision to license no more facilities in the Town of Cottage Grove between then and January 1, 1973, when the question would be reassessed because of the protests voiced at the March 23rd meeting. After discussion, this decision was modified to allow for a reassessment before January 1, 1973, if the department had reason to believe the community's receptivity to additional children had changed. The basis for this decision were provisions in the Rules for Licensing Child Welfare Institutions, PW-CY 40.51 (1) (a) and PW-CY 40.53 (2) which stressed the protection of the safety and welfare of the children, it being thought that living in a hostile community was not in the best interests of the children. This decision and the reason therefor were set forth in a letter from Buehler to Brown dated April 21, 1972 (Ex. 3).

ISSUES PRESENTED

The Court and counsel agreed at the conclusion of the hearing of evidence on May 5th that there are three issues presented, they being:

(1) Do the Browndale homes qualify as single family dwellings under the ordinance?

(2) If they do not so qualify, was the decision of the Board correct that these homes are of the same category as the institutions named in Sec. 10.12 (2) (c) of the ordinance so as to require site approval before they can be located in a Residential R-4 or an Agricultural A-1 district?

(3) If the Browndale homes are not permitted use under the ordinance in any residential or agricultural use district, are they excluded altogether, or are they permitted under some permitted use of similar category?

Upon further reflection the Court has concluded that the third enumerated issue is not to be resolved in isolation after resolving the first two issues because the resolution of this issue may well play a part in resolving one or both of the other issues.

BROWNDALE HOMES AS SINGLE FAMILY DWELLINGS

Single family dwellings are a permitted use under the ordinance in all four residential districts, and also in the

agricultural district (A-1) without necessity of obtaining site approval. A single family dwelling is defined by Sec. 10.01 (19) as:

> "A building designed for and occupied exclusively as a residence for one family."

A family is defined by Sec. 10.01 (19) as:

> "Any number of individuals related by blood or marriage, or not to exceed five (5) persons not so related, living together on the premises as a single housekeeping unit, including any domestic servants."

A Browndale home, as exemplified by the six now operating in Dane County, which operates with no more than five children housed therein has no more than five unrelated persons "living together" if the therapeutic parents and other employees of Involvement Centers servicing that unit are excluded. No employee of Involvement Centers, including the therapeutic parents, sleep at one of these homes.

Does "living together" require that one sleep at least part of the time on the same premises with certain persons in order to be considered to be living with them? The Court could find no help in resolving that question from the dictionary definition of "living" or from the cases cited in 25A Words and Phrases under the term "Living Together". The latter cases mostly deal with husband and wife, or parent and child, and none deals with the situation where people associate and eat together in the daytime and then sleep in their separate places of abode. The Court has also checked Anderson, American Law of Zoning (1968) Sec. 8.27 et seq., dealing with single-family districts, and found nothing in the text or cited cases which deals with a situation

where a person eats and spends the day with others in one place and returns to his place of residence to sleep at night.

The Court believes that for the purposes of zoning statutes and ordinances the term "living together" can apply to but one location, not two. In a situation like we have here with the therapeutic parents and domestic employees residing and sleeping off the premises, undoubtedly in some cases with members of their own family, the place where they live with others is where they sleep and have their permanent home. Thus the Court determines that the therapeutic parents and other employees of Involvement Centers who render service in the Browndale homes operated in Dane County are to be excluded in determining whether five or more unrelated persons are living together in the sense of that term as used in Sec. 10.01 (19) of the ordinance.

Are there other factors which prevent a Browndale home having no more than five emotionally disturbed children from qualifying as a single family dwelling under the ordinance? Three factors have been urged by counsel for the Board and the intervener town as preventing these Browndale homes from so qualifying: (1) the licensing of them as child welfare institutions; (2) the fact that some are licensed for a maximum of as many as eight children; and (3) the children are involuntary residents of such homes.

An aspect of the effect of licensing as a child welfare institution is that the homes are subject to inspection by the Division of Industrial Safety and Buildings to see that they comply with the State building code and requirements established through such inspections (PW-CY 40.53 (1) (a) and (c)), while ordinary private residences and foster homes are not subject to such inspection. There is no requirement in the department's Rules for Licensing Foster Homes that

the foster parents sleep on the premises where the children live with whose custody they have been entrusted. Miss Neupert testified to this and the Court has verified this by inspection of such rules. She further testified that the four Browndale homes in Dane County which she visited would each qualify as a foster home. In fact up until January 1, 1972, they were so licensed as foster homes, and the reason for changing the license to a child welfare agency had nothing to do with building code compliance or inspections. The Court determines that the fact that the requirements of PW-CY 40.53 (1) and (a) apply to Browndale homes licensed as child welfare institutions and not to private residences or foster homes does not place Browndale homes without the definition of single family dwellings of the ordinance.

While dealing with this matter of licensing as a child welfare institution it must be kept in mind that the nature of the operation of the Browndale homes in Dane County did not change one iota from what it was when they were licensed as foster homes with respect to any aspect which would affect zoning. As Miss Neupert testified, their operation does not have the characteristics of what one ordinarily associates with institutional care of children. Furthermore, it is conceded that foster homes, in which not more than five unrelated persons reside, qualify as single family dwellings under the ordinance. It would clearly be a denial of equal protection of the laws under the Fourteenth Amendment to so interpret and administer the ordinance as to permit foster homes having no more than five unrelated persons residing therein in residential and agricultural districts without the necessity of site approval, and require site approval for a Browndale home having no more than five unrelated children and no adults residing therein.

The Court now turns to the situation with respect to those Browndale homes in the county whose maximum capacity as stated in Involvement Center's license is more than five children but have no more than five children living therein. (None are licensed with a greater maximum capacity than eight children.) The Court determines that this feature of the license does not prevent such a Browndale home from qualifying as a single family dwelling under the ordinance. Should Involvement Centers violate the ordinance by having more than five children in the home, except on a very short temporary basis, if located in an R-1, R-2, or R-3 residence district, or RH-1 Rural Homes District, it would be subject to the penalties, including injunctional restraint, provided in Sec. 10.25 (6) of the ordinance. If located in an R-4 or A-1 Agricultural District, it would be a violation unless site approval was first obtained.

Lastly, the Court considers the argument that the children in a Browndale home are involuntarily detained there. They are no more involuntarily detained than are children in a foster home. Furthermore, the testimony of Brown is uncontradicted that, if children desire to leave, their wishes are respected and the placement authority is requested to place them elsewhere. The Court holds that the factor of the nature of the custody, being no different than that in foster homes, does not prevent Browndale homes from qualifying as single family dwellings under the ordinance so long as no more than five unrelated people live together therein.

It is the Court's ultimate conclusion that the Board's interpretation of the ordinance that Browndale homes, regardless of the number of unrelated persons living together therein, cannot qualify as single family dwellings of the ordinance, cannot be sustained on any rational basis.

BROWNDALE HOMES REQUIRING SITE APPROVAL

Nowhere in the ordinance is there a permitted use specified in the four residence districts and the RH-1 rural home districts which covers the operation of a Browndale home in which in excess of five, but not more than eight, children reside.

Counsel for the intervener has urged that "extended care facilities" of Secs. 10.08 (1) (d) and 10.12 (2) (d) cover such homes. The first of these two provisions grants permitted use status of R-4 residence districts to "nursing homes, convalescent homes or extended care facilities", provided site approval is obtained. The second specifies that "hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanges" are a permitted use in A-1 Agricultural Districts, provided site approval is first obtained.

Counsel bases his argument on separate dictionary definitions of the words extended, care, and facilities. The definition which has led counsel astray is his selecting from among the several synonymous adjectives of "extended" that which equates extended with "intensive or extensive". The more appropriate synonymous dictionary adjective is "prolonged". Extended care facilities have a common accepted meaning of providing care for a period beyond that provided by some other facility such as a hospital. Under the Medicare feature of the Social Security Act extended care facilities are facilities for caring for people after leaving a hospital who are not sufficiently recovered to return to their own homes. The Court determines that a Browndale home is not an "extended care facility" within the meaning of the ordinance.

The welfare of emotionally disturbed children living in Browndale homes requires that such homes be located where other private families reside, and not be confined to a district zoned as a commercial or industrial district. A zoning ordinance which does not permit such houses to be located in any district where families usually reside would in the Court's opinion be unconstitutional. A State interest is involved because the Division of Family Services places children in these homes, and a zoning ordinance which excludes them from all residential districts would be unconstitutional. **Abbott House v. Terrytown** (1970), 34 App. Div. 2d 281, 312 NYS 2d 841.

It is the duty of a court in construing a statute or ordinance to so construe it not only in such a manner as to avoid a construction that will render it unconstitutional, but also so as to avoid grave doubts on its constitutionality as construed. **Swanke v. Oneida County** (1953), 265 Wis. 92, 99, 60 N.W. 2d 756, 62 N.W. 2d 8. The Court deems that in accordance with this principle search should be made for the most nearly analogous use permitted under the ordinance in a residential use district. The Court deems that nursing homes, convalescent homes, or, extended care facilities permitted in any residential district. However, Sec. 10.12 (2) (d) of the ordinance permitting such use does so on the condition that site approval is obtained from the County Zoning Committee. The Court determines that such a requirement is a valid and constitutional one.

Thus it is the Court's conclusion that Browndale home in the county in which more than five, but not in excess of eight, children reside is a permitted use in either R-4 residential and A-1 Agricultural Districts provided site approval is first obtained as provided in the ordinance.

CONCLUSION

Findings of Fact, Conclusions of Law, and Judgment will be made and entered consistent with this decision.

Dated this 15th day of May, 1972.

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT

BROWNDALE INTERNATIONAL, LIMITED, a Canadian corporation,
Petitioner, Case No. 135-488

vs.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, consisting of MILLARD ERICKSON, OSCAR HOLTE, and HARLAND DAHLK,
Respondent, FINDINGS OF FACT AND CONCLUSIONS OF LAW

and

TOWN OF COTTAGE GROVE,
Intervener.

BEFORE HON. GEORGE R. CURRIE, RESERVE CIRCUIT JUDGE.

The above-captioned certiorari action having come on for trial before the Court, George R. Currie, Reserve Circuit Judge, presiding, on the 4th and 5th days of May, 1972; and the petitioner having appeared by Attorney Richard C. Glesner and Robert D. Martin of the law firm of Ross,

Stevens, Pick & Ross; and the respondent Board having appeared by Attorney A. Roy Anderson of the law firm of LaFollette, Sinykin, Anderson & Abrahamson; and the intervener having appeared by Attorney Lloyd A. Schneider; and after hearing the proofs of the parties and the Court having filed its Memorandum Decision, I, the judge before whom the action was tried, make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. A Browndale home is a home for emotionally disturbed children wherein the children are housed in a single family type of dwelling and are cared for in a manner closely resembling that of a family as distinguished from an institutional type of care, all as more particularly described in the Court's memorandum opinion.

2. Prior to January 1, 1972, petitioner corporation operated five Browndale homes in Dane County which were licensed as foster homes by the Division of Family Services (hereafter the "Division") of the Wisconsin Department of Health and Social Services (hereafter the "Department"), the licenses being issued to the "therapeutic parents" in each home who were employees of petitioner.

3. About January 1, 1972, all of these homes were leased by petitioner to Involvement Centers, Wisconsin, Inc., (hereafter "Involvement Centers") a newly incorporated Wisconsin corporation, which continued to operate these homes in the same manner as petitioner had operated them.

4. On or about January 28, 1972, the Division concluded that these homes should no longer be licensed as foster homes but a license should be issued to Involvement Centers as a child welfare agency. Such a license was then issued

to Involvement Centers, which license described each home and set a maximum number of children which could occupy each house, in no case exceeding eight children. Under the rules of the Department each Browndale home, as a result of licensing Involvement Centers as a child welfare agency, became a child welfare institution. The change in licensing did not change the method of operating the Browndale homes and they continued to be operated the same as when licensed as foster homes.

5. Early in 1972 a sixth Browndale home was instituted in the Town of Cottage Grove in Dane County in a leased dwelling house and Involvement Centers' child welfare agency license was amended to cover this Browndale home.

6. The number of emotionally disturbed children living in each Browndale home in Dane County varies from a minimum of four to a maximum of eight.

7. Neither the therapeutic parents nor any other employee of petitioner or Involvement Centers sleeps at any Browndale home but such sleeping is done at their usual place of abode elsewhere; however, there is an employee of Involvement Centers who comes in and stays with the children at night.

8. In December and January, 1972, petitioner contracted to purchase six dwelling houses in the Town of Cottage Grove for the purpose of operating Browndale homes therein, one of which homes being the one in which the present Browndale home in that town is being operated. These contracts were conditioned upon licensing being secured from the department and approval being secured from the

proper zoning authority for use of the purchased property for the petitioner's special purpose (meaning the operating of Browndale homes).

9. Petitioner sought and secured from Lavern J. Enger, Zoning Supervisor, a position created by the Dane County Zoning Ordinance, (hereafter "the ordinance"), an interpretation of the ordinance with respect to whether a site approval from the Dane County Zoning Committee as a condition precedent to the operation of Browndale homes in the additional houses contracted to be purchased, all of which are located in an A-1 agricultural district, was required. Zoning Supervisor Enger ruled that no site approval was required.

10. The Town of Cottage Grove and an individual resident of the town appealed from this interpretation by Enger to the respondent Board of Adjustment. A public hearing was held on the appeal and on March 17, 1972, the respondent Board issued its decision which essentially was that Browndale's homes do not qualify as a "single family dwelling" as that term is defined in Sec. 10.01 (18) and (19) of the ordinance; that such homes are a type of use that falls within the category of institutions listed in Sec. 10.12 (2) (c) of the ordinance, and, therefore required site approval; and the petitioner was ordered to desist from operating Browndale homes in the town until site approval had been obtained from the Dane County Zoning Committee.

11. Thereafter, petitioner instituted this certiorari action to review the respondent Board's decision of March 17, 1972.

CONCLUSIONS OF LAW

1. A Browndale home in which not more than five emotionally disturbed children reside, and that is operated as described in the foregoing findings of fact, qualifies as a single family dwelling under the ordinance and requires no site approval under the ordinance in order to operate in Dane County.

2. A Browndale home in which more than five emotionally disturbed children are to reside, except on a very short temporary basis, does not qualify as a permitted use in R-1, R-2, and R-3 residence districts; but constitutes a permitted use in R-4 residence districts and A-1 agricultural districts only on condition site approval is granted by the Dane County Zoning Committee.

3. The decision of the respondent Board of March 17, 1972, is an incorrect, and therefore illegal, interpretation of the ordinance in those respects wherein its interpretation is inconsistent with Conclusions of Law 1 and 2.

Let judgment be entered reversing the decision of the respondent Board dated March 17, 1972, and adjudicating the interpretation of the ordinance set forth in Conclusions of Law 1 and 2.

Dated this 15th day of May, 1972.

George R. Currie
Reserve Circuit Judge

DECISION OF THE DANE COUNTY BOARD OF ADJUSTMENTS REGARDING APPEAL OF THE TOWN OF COTTAGE GROVE AND OLGER GRAFFIN FROM A RULING OF THE DANE COUNTY BOARD OF SUPERVISORS

STATEMENT OF FACTS:

Browndale International, Limited, is a corporation engaged in caring for emotionally disturbed children by trained staff, said children being housed in single family residences.

Browndale International, Limited, is licensed by the State of Wisconsin as a Child Welfare Agency.

Browndale International, Limited, purchased certain single family residences in the Town of Cottage Grove for the purpose of housing and caring for emotionally disturbed children.

The Dane County Zoning Ordinance provides that "not to exceed five unrelated persons may live together as a single family unit in a single family residence."

In the operation of homes by Browndale, the emotionally disturbed children live in the home and there is a staff on duty 24 hours a day who do not sleep on the premises. The Dane County Zoning Supervisor interpreted this operation to be a single family unit in that only two unrelated persons were living there and that this was permitted under the provisions of the Dane County Zoning Ordinance. The Town of Cottage Grove and Olger Graffin on the 9th day of February, 1972, filed an Appeal with the Dane County Board of Adjustments regarding the zoning Supervisor's interpretation of a

single family dwelling. The proper notices of a Public Hearing were published and a Public Hearing was held on March 10, 1972. Browndale International, Limited, was represented by Attorney Richard Glesner and the appellants were represented by Attorney Lloyd Schneider.

After a Public Hearing duly held, the Board of Adjustments makes the following findings:

1. That Browndale International, Limited, is a licensed Child Welfare Agency of the State of Wisconsin and that any homes operated by it for emotionally disturbed children must meet requirements of the State Industrial Commission which single family dwellings do not.

2. That the Board finds that it was not the intent of the definition of a single family dwelling to include treatment of unrelated emotionally disturbed children by unrelated persons.

3. The Board finds that the State of Wisconsin requires that the persons staffing the homes must have certain qualifications which will enable them to provide treatment for the problems of the emotionally disturbed children.

4. The Board further finds that the type of use covered by this Appeal falls within the category of definitions listed under Section 10.12 (2) (c) of the Dane County Zoning Ordinance and, therefore, requires site approval for such use.

THEREFORE, the interpretation of the Dane County Zoning Supervisor of the definition of a single family dwelling and a single family unit is modified to the extent that the Board finds that the use intended by Browndale International, Limited, requires site approval under Section

10.12 (2) (c) of the Dane County Zoning Ordinance and that it is not a single family dwelling or a single family unit within the meaning of the Dane County Zoning Ordinance.

THEREFORE, the Board of Adjustments hereby orders Browndale International, Limited, to cease and desist from operating a Child Welfare Agency for the treatment of emotionally disturbed children in the Town of Cottage Grove until such time as site approval has been obtained from the Dane County Zoning Committee pursuant to the Dane County Zoning Ordinance.

Dated this 17th day of March, 1972.

DANE COUNTY BOARD
OF ADJUSTMENTS

By: _____
Millard Erickson, Chm.

_____
Oscar Holte

_____
Harland F. Dahlk

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED, A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

LLOYD A. SCHNEIDER
Counsel for Respondent,
Town of Cottage Grove

LLOYD A. SCHNEIDER
5906 Main Street
McFarland, Wisconsin 53558

The Gilman Press, Inc., Madison, Wisconsin 53703

INDEX

PAGE

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI 2

RESPONSE TO PETITION 2

QUESTION PRESENTED 3

ADDITIONAL STATUTES AND ORDINANCES INVOLVED 4-9

STATEMENT OF THE CASE 9-12

WHAT IS A BROWNDALE HOME? 9-11

TYPE OF CHILDREN INVOLVED 11-12

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI 12-18

1. DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND JUDGMENT RESTS ON ADEQUATE NON-FEDERAL BASIS 12-17

2. JUDICIAL QUESTION IS NOW MOOT 17-18

CONCLUSION 19

CITATIONS

CASES:

PAGE

Boraas v. Village of Belle Terre, 476 F. 2d 806 (2nd Cir. 1973) *U. S. Appeal Docketed*, No. 191, 42 U.S.L.W. 3109

probable jurisdiction noted, 42 U.S.L.W. 3226 ..... 14, 15

Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) 17

CONSTITUTIONAL PROVISIONS:

Due Process Clause, U. S. Const., Amend. XIV, Sec. 1 14

Equal Protection Clause, U. S. Const., Amend. XIV, Sec. 1 13-14

FEDERAL STATUTES:

Federal Civil Rights Act of 1971, 42 U.S.C., Sec. 19.83 14

WISCONSIN STATUTES (1971):

Chap. 48 16

Sec. 70.11 4

70.11 (19) 4, 10

48.60 ..... 4-5, 5

48.62 ..... 5, 6

PAGE

Wisconsin Rules for Licensing Child Welfare Institutions 5

Wisconsin Rules for Licensing Foster Homes 5

DANE COUNTY ORDINANCES (1971):

Sec. 10.12 (2) 4

10.12 (2) (c) 15

10.25 (4) 4, 15

10.26 (3) (a) (3) 16

DANE COUNTY ORDINANCES (1972):

Sec. 10.12 A-1 ..... 6, 15

10.12 (2) 6

10.25 6

10.25 (7) (a) and (g) 7-8

DANE COUNTY ORDINANCES (1973):

Sec. 10.01 (23a) 9

10.12 (2) (q) 7

TEXTS CITED:

Anderson, American Law of Zoning 13

In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED, A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Respondent, Town of Cottage Grove, respectfully prays that the petition of the Petitioner, Browndale International Limited, for the issue of a Writ of Certiorari to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceeding on June 18, 1973, be dismissed.

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTIORARI

1. That the appeal from the Wisconsin Supreme Court presented to the Court does not present a substantial Federal question, and the judgment of the Wisconsin Supreme Court rests on an adequate non-federal basis.

2. The appeal presented to the Court is now moot, as a result of the amending of the Dane County Ordinance, by the Dane County Board. The validity of this new ordinance has not been presented to or expressly passed upon by the Wisconsin Supreme Court.

RESPONSE TO PETITION

The petition for a Writ of Certiorari was served by mail upon the attorney for the Respondent, Town of Cottage Grove, on December 7, 1973, and this response in opposition to the granting of said writ was filed within 30 days of that date in compliance with 28 U. S. C., Supreme Court Rules, Rule 16 (1).

References to "R. ....." are to the certified record. References to "App. ....." are to the Appendix of Appellant's petition. Reference to "Ex. ....." are to exhibits filed with the Circuit Court, which are a part of the record in the Court below and in this Court. References to "I Ap. ....." are to the Appendix of the Intervenor-Appellant filed with the Court below and a part of the record of that Court and in this Court. Aeferences to "P. Br. ....." are to the page of petitioner's brief in this Court.

QUESTION PRESENTED

This is solely a zoning question. Pursuant to the police powers delegated to the County of Dane by the State of Wisconsin, is it constitutional for the Dane County Board of Adjustment to interpret the ordinance in such a manner as to distinguish between a corporation operated for profit and licensed as an institution for the treatment of emotionally disturbed children from a single family dwelling, thereby requiring the corporation to attain approval of site after a public hearing?

ADDITIONAL STATUTES AND ORDINANCES INVOLVED

The statutes and Dane County Ordinances involved in addition to the constitutional provisions, statutes and ordinances cited in Petitioner's petition are: Sec. 70.11 (19), Wis. Stats.; Sec. 48.60, Wis. Stats., 48.62, Wis. Stats.; and Sec. 10.12 (2) (Repealed and recreated); Sec. 10.12 (2) (q), (Created); Sec. 10.25 (4) (Repealed and recreated as Sec. 10.25 (7)) and Sec. 10.01 (23a) (Created), Dane County Ordinance, as amended effective September 7, 1972 and October 16, 1973.

SECTION 70.11 (19), WIS. STATS. (1971)

70.11 Property Exempted from Taxation. The property described in this section is exempted from general property taxes:

(19) INSTITUTIONS FOR DEPENDENT CHILDREN, ETC. All the real and personal property of any children's institution licensed for the care of dependent, neglected or delinquent children under s. 48.60 while the same is actually used for such purpose and all real and personal property of any institution for mentally deficient children described in s. 48.60 (2) (f) while the same is actually used, not for profit, for the care of mentally deficient children.

SECTION 48.60, WIS. STATS., (1971)

48.60 Child Welfare Agencies licensed. (1) No person shall receive children with or without transfer of legal custody, to provide care and maintenance for 75 days in any consecutive 12 month period for 4 or more such children at any one time unless he obtains a li-

cense to operate a child welfare agency from the department.

(WISCONSIN) RULES FOR LICENSING CHILD WELFARE INSTITUTIONS. (R. unnumbered)

PW-CY-40.50 (e) definitions

6. Child Welfare Agency	Any facility required to be licensed under Section 48.60, Wis. Stats.
7. Child Welfare Institution	A child welfare agency which regularly provides care and maintenance for children within the confines of its building.

PW-CY-40.51 (1) INCORPORATION

Every child welfare agency shall be incorporated. Any agency incorporated outside of Wisconsin shall secure authorization from the Secretary of State to do business in Wisconsin.

SECTION 48.62 WIS. STATS. (1971)

48.62 Foster Homes Licensed. (1) No person shall receive with or without transfer of legal custody, any child to provide care and maintenance for that child unless he obtains a license to operate a foster home from the department or from a county agency as provided in s. 48.75.

(WISCONSIN) RULES FOR LICENSING FOSTER HOMES (R. unnumbered)

PW-CY-40.50 (1) (d) DEFITIONS

4. Foster home	Any facility operated by a person required to be licensed under Section 48.62, Wis. Stats.

PW-CY-40.61 (2) (a) AGE OF FOSTER PARENTS.

No applicant or applicants may receive a license for the first time when one or both are younger than 21 or older than 64 years.

PW-CY-40.61 (4) (a) HEALTH OF FOSTER FAMILY.

All members of the foster family household must be in physical and mental health that will not adversely affect the health of children received for care, or the quality and manner of their care.

PW-CY-40.63 (1) (b)

The foster mother shall not be regularly employed outside the home without written approval of the licensing agency. . . .

DANE COUNTY ORDINANCES REPEALED, AMENDED OR CREATED

SECTION 10.12 A-1 AGRICULTURAL DISTRICT, DANE COUNTY ORDINANCE (1972) ADOPTED AND EFFECTIVE SEPTEMBER 7, 1972.

(2) CONDITIONAL USE IN A-1 AGRICULTURAL DISTRICT.[1]

---

[1]The above ordinance repeals old Section 10.12 (2), which was stated as follows: "PERMITTED USES WHICH ARE SUBJECT TO PROVISIONS OF 10.25 (4) APPLICATION FOR APPROVAL OF SITE."

SECTION 10.12 (2) (q), DANE COUNTY ORDINANCE, (1973) created and adopted August 23, 1973, effective October 16, 1973, is created to read as follows:

SECTION 10.12 (1) (a), DANE COUNTY ORDINANCE (1973).

SECTION 10.12 A-1 AGRICULTURAL DISTRICT

(1) PERMITTED USES

(a) SINGLE FAMILY DETACHED DWELLING UNITS

. . .

(2) CONDITIONAL USES PERMITTED IN THE A-1 AGRICULTURAL DISTRICT

. . .

(q) Institutions for children.

SECTION 10.25 ADMINISTRATION, ENFORCEMENT AND PENALTIES.

. . .

(7) CONDITIONAL USES

(a) Statement of purpose:

The development and execution of this ordinance is based upon the division of the County into districts, within which districts the use of land and buildings, and bulk and location of buildings and structures in relation to the land are mutually compatible, and substantially uniform. However, there are certain uses which, because of their unique characteristics, cannot be properly classified as unrestricted permitted uses in any particularly district or districts, without consideration, in each case, of the impact of those uses upon neighboring land or public facilities, and of the public need for the particular use at a particular lo-

cation. Such uses, nevertheless, may be necessary or desirable to be allowed in a particular district provided that due consideration is given to location, development, and operation of such uses. Such uses are classified as conditional uses and are uses entirely private in character, but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities.

. . .

(g) Standards:

1. That the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.

2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation of the conditional use.

3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.

4. That adequate utilities, access roads, drainage and other necessary site improvements have been or are being provided.

5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public street, and

6. That the conditional use shall conform to all applicable regulations of the district in which it is located.

10.01 Definitions:

. . .

(23a) Institutions for children: An institution for the care of children are licensed and authorized by the Wisconsin Department of Health and Social Services under Chapter 48, Wisconsin Statutes.

. . .

STATEMENT OF THE CASE

WHAT IS A BROWNDALE HOME?

The purpose of a Browndale home is for treatment of emotionally disturbed children, on a commercial basis by a private corporation organized for profit. (R. 198, 281; I Ap. 129, 131)

Browndale International Limited owns or leases the premises that are the abode and treatment center for the emotionally disturbed children. It leases or subleases these premises to a subsidary corporation known as Involvement Centers, Wisconsin, Inc., (hereinafter "Involvement Centers") on a net rental basis of between $400.00 and $1,000.00 per month. (R. 187, 206; I Ap. 129, 130)

Involvement Centers are licensed by the Wisconsin Department of Health and Social Services (hereinafter "Department") as a child welfare agency. (Ex. 1; R. 64-65; I Ap. 111-113) A child welfare agency which regularly provides care and maintenance for children within

the confines of its building is defined by the Department as a Child Welfare Institution.[2]

All buildings used as a child welfare institution in Wisconsin must be inspected and approved by the Industrial Commission of Wisconsin before they can be used as an institution. (R. 209; I Ap. 120) Single family residential homes and foster homes in Wisconsin do not have to be approved by the Wisconsin Industrial Commission.

Browndale Homes are exempt from property tax.[3] Foster homes and single family residences are not so exempt.

Involvement Centers submitted a budget to the State of Wisconsin for the year 1972 in the amount of $1,528,-655.00, which the Bureau of Budget by a desk audit dated January 22, 1972, reduced to $1,186,686.00 as a cost basis of profit and allowed a profit of 8% thereon in the amount of $94,931.00. (Ex. 6; R. 71-74, p. 74; I Ap. 117-122, p. 122)

Browndale had preliminary plans to operate 21 houses on the lands it offered to purchase in the Town of Cottage Grove (hereinafter "Town") but later the plans were changed to complete only 6 homes. (R. 101; I Ap. 105) Browndale offered to purchase 3 homes on platted lots from one Moe for $101,650.00 (R. 75; I Ap. 122-124) and two farms comprising 182 acres, more or less, from one Miller for $193,000.00. (R. 76; I Ap. 125-127) The two farms are contiguous to each other in the Town of Cottage Grove.

---

[2]Rules for Licensing Child Welfare Institutions. PW-CY 40.50 (1) (e) (7).

[3]Section 70.11 (19), Wis. Stats. (1971)

The Department in licensing homes for Involvement Centers is concerned over the community's receptivity to additional children being placed in one area in the town. (Ex. 3; R. 67-68; I Ap. 114-116 and Ex. 5; R. 69; I Ap. 116-117) The people of Cottage Grove were found to have no objection to the one Browndale Home that was licensed there. (R. 360)

TYPE OF CHILDREN INVOLVED

Emotionally disturbed children present a behavior problem to the area in which they are institutionalized. (R. 131, 134, 226, 244; I Ap. 129, 130) They are deviant for saneness. (R. 137; I Ap. 129) They require intensive care (R. 251-253; I Ap. 130) and many of them have had difficulty with the law (R. 208; I Ap. 130) and "two people get worn out by these kinds of kids" (R. 144; I Ap. 129) and "normally you run 20 or 25 children per social worker." (R. 145; I Ap. 129) They need medical attention from a psychiatrist and other medical specialists (R. 146; I Ap. 129) and for some "it takes a period of time before they become civilized" (R. 163; I Ap. 129) and they come to Browndale because they are children that no other institution would accept. (R. 168, 244; I Ap. 129, 130) They are children who have presented problems elsewhere and so bring these problems to the institution. (R. 134; I Ap. 129) When referring to their therapeutic parents, they may refer to them by unmentionable profanities. (R. 154; I Ap. 129)

Browndale children are received under guardianship of the state or courts (R. 225; I Ap. 130) and are placed

involuntarily with Browndale. They may consist of the 1% most disturbed in the state (R. 218; I Ap. 130) and require strict supervision and extended care (R. 251, 253; I Ap. 130) and are most difficult children. (R. 226; I Ap. 130)

BASIS FOR OBJECTING TO GRANTING WRIT OF CERTORARI

1. DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND JUDGMENT RESTS ON ADEQUATE NON-FEDERAL BASIS.

The people in the Town did not and do not object to the one Browndale home being licensed in the Town. They realize the duty of every community to accept its fair share of unfortunate children for rehabilitation. The people and the town board were concerned about the operation of 21 Browndale homes in one area. They felt they would present a behavior problem to adjacent residences and land owners. The Town would be presented with a police protection problem. The local schools could also be imposed upon to cope with scores of emotionally disturbed children.

The proposal of Browndale to construct and operate 21 homes in one area in the Town not only presented many problems to the Town, school system and adjacent residences and landowners, but defeated the purpose of the program established for the best interests of the children. Instead of dispersing the children among normal family residential groups during their treatment period, it was taking them from a one-building institution and placing them in an institutional-motel sytem. One community

should not be expected to accept hundreds of these children. The necessity of zoning to protect the children and the community is apparent.

Anderson, American Law of Zoning, Section 9.15, p. 140, states:

> "*Property owners in some residential neighborhoods react more strongly to a proposed use of nearby land by institutions, public or private, for the education and care of delinquent or retarded children,* than to a projected use of the same land for the education of presumably normal children. *Institutions of the former kind are believed to pose a greater threat to the character of a residential neighborhood, and to its* property values." (Emphasis ours)

and at Section 9.39, p. 193 states:

> "The nonprofit uses also include hospitals, convalescent homes, sanitariums and shelters established to meet particular needs. . . . All of these nonprofit uses supply a community need, but all of them generate traffic and produce noise and activity which may disturb the peace of a residential neighborhood and reduce the value of land in a residential district." . . . "*Since these uses are not always compatible with residential neighborhoods the problem is one of accommodating a desirable use to the circumstances of a site where it does not automatically blend with its surroundings.*" (Emphasis ours)

Therefore, it was reasonable for the Board of Adjustment to interpret the ordinance requiring approval of site after a public hearing in order to determine the affect a Browndale home would have on the adjacent residents and property values. The Equal Protection Clause of the

Constitution should not be used as a basis of taking property without due process, such as the probable reduction of property values, without the necessity of a public hearing for approval of site. State police powers take into consideration the rights of individuals to enjoy their home without probable disturbance from the conduct of large concentrations of emotionally disturbed children.

This case presents a zoning question only. No race, sex or minority group discrimination is involved. It is purely a question of a unit of government, pursuant to its police powers, determining the best manner in which it can rehabilitate emotionally disturbed children with the least possible adverse effect upon the property rights and individual rights of others.

In *Boraas v. Village of Belle Terre*, 476 F. 2d 806 (2d Cir. 1973) U. S. Appeal Docketed, No. 191, 42 U. S. L. W. 3 (09), six unrelated, unmarried, healthy people lived together in one house and were racially discriminated against by being denied (on the basis of being illegal residents) residents' beach passes. The action in *Boraas* was commenced under the Federal Civil Rights Act of 1871, 42 U. S. C. Sec. 1983, not as a zoning action.

The interpretation of the ordinance by the Board of Adjustment for Dane County had nothing to do with compelling persons who take up residence in the community to conform to the community's prevailing ideas of life style. (3 unmarried couples of opposite sex). *Boraas* overruled the Village of Belle Terre because the Village's decision had no relevance to public health, safety or welfare or to the theory that it had a national basis of traditionaly recognized zoning objectives. This has no simile

with a Browndale home. The children in Browndale homes are being medically treated for rehabilitation, which is their primary purpose of being institutionalized. They are not in the home for the primary purpose of living.

The State of Wisconsin has licensed Involvement Centers as a child welfare agency, which is defined by the Department to be a Child Welfare Institution. Section 10.12 A-1 (2) (c), Dane County Ordinance (P. Br. 6) is a logical interpretation in which to classify an institution for children, requiring approval of site under Sec. 10.25 (4), Dane County Ordinance. There is nothing "suspect" about this classification as defined in *Boraas* and is "compelling" and "necesary" to achieve the purpose of the zoning ordinance and make it workable.

Petitioner stated that the Board of Adjustment's interpretation is a dangerous Constitutional precedent that bars emotionally disturbed children from being in residential areas. This is not true. The interpretation only allows the County of Dane to control the quantity and concentration of such institutions. In short, petitioner is asking that the Court declare all approval of site and conditional use ordinances unconstitutional on the basis that its zoning committee does not have the good sense to exercise sound discretion in the best interests of the zoned area.

Petitioner's assumption that Browndale Homes were validly licensed as a foster home by the Department has no basis in fact. Neither Browndale International, nor Involvement Centers were ever licensed as a foster home. Some of their employees were licensed to operate a foster home as foster parents. (R. 306; I Ap. 131) John Vick, the Agency Licensing Supervisor for the Department, tes-

tified that a foster home license was not an appropriate license for this organization (Browndale or Involvement Centers) in terms of the kind of program that they proposed to operate. (R. 278, 306, 307) Therefore, any comparison of a Browndale home with a foster home is out of context as can be readily seen from a comparison of the above cited respective legal requirements and definitions enumerated on pages 5-8 herein.

The Dane County Ordinance, Sec. 10.26 (3) (a) (3), requires the Board of Adjustment to interpret the ordinance in the pubic interest and not contrary to its general intent.[4] The ordinance in question was created in 1938 many years before the concept of a Browndale home was ever imagined. It was its duty to determine, in the interest of the surrounding property owners, whether a Browndale institution for children, comprising of possibly 21 units in one concentrated area would have an adverse affect upon property values and normal use of the agricultural area, and to determine if the necessity of control, both from the point of view of quantity and location, was necessary in the best interest of the community. The amended ordinance adopted by the Dane County Board relative to institutions for children, specifically defining Browndale homes licensed under Chapter 48, Wis. Stats., as institutions for children, confirms the interpretation of the Board of Adjustment as being the general intent of the ordinance.

The Court should not substitute its judgment in interpreting an ordinance for the good judgment of the Board

---

[4]Sec. 10.26 (3) (a) (3) states: "In deciding appeals the board may sustain or reverse the decision of the zoning supervisor or make such modification or adjustment in the order as shall be in the public interest and result in substantial justice being done, but no such decision shall be contrary to the general intent of the ordinance."

of Adjustment. In *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926), p. 388, the Court said:

> "If the municipal Council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the Courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot—not the Courts."

Such is the care at bar and this appeal does not present to the Court a susbtantial Federal question, and the decision of the Wisconsin Supreme Court rests on adequate non-federal basis.

2. JUDICIAL QUESTION IS NOW MOOT

The Dane County Board has now amended the Dane County Ordinance and has defined "Institutions for children". This leaves moot the necessity of interpreting the ordinance for applicability to a Browndale home, subjected to zoning under the prior ordinance. This action concerns one Browndale home in the Town. No one objected to this one home. It could be permitted at this time as a conditional use under the new ordinance, without objection. Any additional Browndale homes applying for a conditional use permit would be controlled by the new ordinance and would not depend upon the decision in this case. Therefore, for practical purposes the appeal in this case is now moot. (In *Euclid*, Supra, p. 396, the Court said:

> "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the Commissioners from giving it any effect whatever or against this company."
>
> . . .
>
> "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideraiton when presented."

And at page 397, the Court said:

> "And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court, has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessity of the immediate issue. . . ."

The Wisconsin Supreme Court has not had the opportunity to rule on the validity of the new ordinance.

CONCLUSION

A Browndale home is an institution for children and it was not a violation of the 14th Amendment to refuse to classify it under the Dane County Ordinance as a single family residence. The issues are a proper discretionary subject for the exercise of police powers by zoning regulations. The judgment of the Wisconsin Supreme Court rests on a sound and adequate non-federal basis. The adoption of the new Dane County Ordinance defining "Institutions for Children" leaves the issue before the Court substantially moot.

This case is a zoning question only. No race, sex or minority group discrimination is involved. It is a question of the police powers of the state determining the best manner in which it can rehabilitate emotionally disturbed children with the least possible adverse affect upon the individual rights and property rights of others.

Respectfully submitted,

LLOYD A. SCHNEIDER
Counsel for Respondent,
Town of Cottage Grove

LIBRARY
SUPREME COURT, U. S

IN THE

SUPREME COURT OF THE UNITED STATES

No. 2 [illegible]

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

BRIEF OF RESPONDENT BOARD OF ADJUSTMENT FOR DANE COUNTY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

GLEN L. HENRY,
DANE COUNTY CORPORATION COUNSEL

ROBERT M. HESSLINK, JR.
ASSISTANT CORPORATION COUNSEL

Room 313D
City-County Building,
210 Monona Avenue
Madison, Wisconsin 53709

INDEX

	Page
QUESTION PRESENTED	1
CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED ..	2
ARGUMENT	2
I PETITIONER MAY NOT ASSERT THE CONSTITUTIONAL RIGHTS OF THE EMOTIONALLY DISTURBED CHILDREN .	3
II THE DECISION BELOW IS NOT INCONSISTENT WITH THE RECENT DECISION IN THE SECOND CIRCUIT	6
III THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT PETITIONER'S CONTENTION THAT THE ORDINANCE DISCRIMINATES AGAINST EMOTIONALLY DISTURBED CHILDREN	9
CONCLUSION	11

CITATIONS

CASES:

Alderman v. United States, 394 U.S. 165 (1969)	4
Boraas v. Village of Belle Terre, 476 F. 2d 806 (2d. Cir. 1973) U.S. Appeal Docketed No. 191, 42 U.S.L.W. 3109 Probable jurisdiction noted, 42 U.S.L.W. 3226	6, 7

Page

Eisenstadt v. Baird,
405 U.S. 438 (1972) 5

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 2

Hale v. Henkel,
201 U.S. 43 (1906) 4

McGowan v. Maryland,
366 U.S. 420 (1961) 4

Missionaries of LaSalette v. Whitefish Bay,
267 Wis. 609, 66 N.W. 2d 627 (1954) 6

Palo Alto Tenants Union v. Morgan,
321 F. Supp. 908 (N.D. Cal. 1970) 8

Rogers v. United States,
340 U.S. 367 (1951) 4

United States v. Raines,
363 U.S. 17 (1960) 4

CONSTITUTIONAL PROVISIONS:

Case or Controversy Clause,
U.S. Const., Article III, Sec. 2 2,4

Due Process Clause, U.S. Const.,
Amend, XIV, Sec. 1 2

Equal Protection Clause, U.S. Const.
Amend XIV, Sec. 1 2,8

DANE COUNTY ORDINANCES (1971)

Sec. 10.12 (2) (c) 2,10

IN THE

SUPREME COURT OF THE UNITED STATES

No.

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,

Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,

Respondents.

BRIEF OF RESPONDENT BOARD OF ADJUSTMENT FOR DANE COUNTY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Does a requirement that treatment facilities for emotionally disturbed children obtain an approval of site before being operated in a single family residence district, violate the equal protection clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES INVOLVED

CASE OR CONTROVERSY CLAUSE U.S. CONSTITUTION, ARTICLE III, SECTION 2

The judicial power shall extend to all cases, in law and equity, arising under this constitution. . . .

ARGUMENT

Petitioner cites Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) for the proposition that zoning ordinances, in order to be constitutionally valid, must satisfy the requirements of due process of law and equal protection of the laws as contained in the Fourteenth Amendment. Dane County concedes, indeed it joins in asserting, that very proposition. It is because of the very fact that it is the policy of the Board of Adjustment to treat substantially equal land uses equally that Petitioner is allegedly aggrieved. Respondent, Dane County, contends that the Petitioner is using an alleged violation of the equal protection rights of the emotionally disturbed children as a smokescreen behind which to hide that it is attempting, by this action, to obtain for itself treatment which is substantially unequal from that afforded other facilities for the treatment of illness which seek to locate in single family residence districts. For, as Sec. 10.12 (2) (c) of the Dane County Zoning Ordinance indicates, all other such facilities for the treatment of illness are required to have site approval in these single family residence districts.

Petitioner has asserted that there are three reasons why this Court ought to grant certiorari in this case. First, Petitioner contends that the decision reached by the Supreme Court of Wisconsin is in direct conflict with a recent decision of the Second Circuit Court of Appeals. That decision has also been appealed to this Court. Secondly, petitioner contends that the Supreme Court of Wisconsin erred in not treating an alleged separate classification of emotionally disturbed children as "suspect". And finally, Petitioner contends that the Supreme Court of Wisconsin has erroneously applied the "old equal protection" standard rather than a new standard, which has supposedly recently emerged, in arriving at its decision in this case.

The Respondent contends that there are three sound reasons why this Court ought not exercise its discretion to grant certiorari in this case: (1) Petitioner lacks standing to raise the particular equal protection argument it seeks to raise; (2) The decision below in this case is not even apparently in conflict with that of the Second Circuit; and (3) There has been no showing below of any classification in the Ordinance, or the way in which it is enforced, which is based upon the emotional disturbance of the children.

I

PETITIONER MAY NOT ASSERT THE CONSTITUTIONAL RIGHTS OF THE EMOTIONALLY DISTURBED CHILDREN

It is clear from the facts of this case that if Petitioner sought to show that its own equal protection rights were being infringed by the Zoning

Ordinance, it would not be successful in doing so. For, it is obvious that not only is Browndale forbidden by the Ordinance to operate treatment facilities for emotionally disturbed children within the single family residence district, but so are all others who may wish to do so. In order to overcome this difficulty, Petitioner instead asserts that it is the emotionally disturbed children who are being excluded from the zoning district in violation of their equal protection rights. Through this mental sleight of hand, petitioner not only seeks to make an argument which it could not make on its own behalf, but it also, by wrapping itself in the cloak of helplessness of an emotionally disturbed child, seeks to argue a "suspect" classification and thus entitle itself to the increased judicial solicitude due a discrete and insular minority.

This Court has consistently held, however, that constitutional rights are personal to the party protected and may not be asserted by another. See, for example, Alderman v. United States, 394 U.S. 165 (1969); McGowan v. Maryland, 366 U.S. 420 (1961); United States v. Raines, 363 U.S. 17 (1960); Rogers v. United States, 340 U.S. 367 (1951); and Hale v. Henkel, 201 U.S. 43 (1906). The rationale underlying this type of treatment in this type of case is not that the Court lacks the constitutional power under Article III, Section 2 of the Constitution of the United States, to decide the issue because no case or controversy is presented. Rather, the rationale goes to the merits of the case itself, i.e., if the plaintiff bringing the action has not been legally wronged, then he is not entitled to a remedy. It is, of course, true that the petitioner may actually suffer adverse consequences as a result of the alleged discrimination against the children in this

case but the mere existence of adverse consequences does not suffice to state a cause of action, there must be a legal wrong done to the party seeking relief. A party may be adversely affected by the introduction of a statement obtained from another in violation of the other's constitutional rights. He may be adversely affected by the introduction of evidence that was obtained through an illegal search of another's premises. He may be forced to lose business by an ordinance that requires Sunday closing in violation of another's religious freedoms. Yet, in each of these situations, this Court has held that the constitutional rights involved are personal to the individual and may not be asserted by another even when the other has suffered adverse consequences. The instant case falls clearly within that same rationale.

It might be argued that the Court has deviated from this policy in the recent case of Eisenstadt v. Baird, 405 U.S. 438 (1972). But, in deciding to hear that case, the Court clearly stated that it was creating an exception to the rule for that unique situation only. The reason for the decision to hear that constitutional challenge via a surrogate lay in the specific statutory scheme involved. The challenged law provided that it was a criminal act to provide contraceptives to unmarried persons but it was not similarily a criminal act for unmarried persons to receive or possess them. The Court noted that even though it was the unmarried persons who were being denied equal treatment, unless the provider was allowed to challenge the law's constitutionality, no one else would have an occasion to do so. The Court then concluded that it would make an exception in that particular case so that the issue might not go unheard.

In the present case, however, ample remedies are available to the parties whose rights are affected to challenge the Ordinance. For example, one need only refer to the case with which Petitioner alleges the decision below differs, Boraas v. Village of Belle Terre, 476 F. 2d 806 (2d Cir. 1973). There the excluded parties challenged the Zoning Ordinance in Federal Court on equal protection grounds and to this point have been successful. Wisconsin Courts too are receptive to such challenges to zoning restrictions. See Missionaries of LaSalette v. Whitefish Bay, 267 Wis. 609, 66 N.W. 2d 627 (1954).

There is, therefore, no need for the Court to make an exception to the rule that constitutional rights are personal in this case.

II

THE DECISION BELOW IS NOT INCONSISTENT WITH THE RECENT DECISION IN THE SECOND CIRCUIT

The Second Circuit Court of Appeals has held that a zoning ordinance requirement which limited the occupancy of dwellings in a single family residence district to not more than two unrelated persons deprived those persons who sought to reside in these districts, in groups of more than two unrelated persons, of the equal protection of the laws, Boraas v. Village of Belle Terre, 476 F. 2d 806 (2d Cir. 1973), U.S. Appeal Docketed, No. 191, 42 U.S.L.W. 3109. This case, its facts and its holding, is totally dissimilar to the holding below in this case. It is true, as alleged by Petitioner, that both cases involve a challenged

classification under a "single family" residence district. It is at this point, however, that any further similarity ceases.

The ordinance involved in Boraas limited the occupation to not more than two unrelated persons. The Ordinance in the instant case would permit up to five such unrelated persons to reside together. The importance of this difference becomes apparent when one realizes that underlying the Court's decision in Boraas was the fact that the limitation imposed on unrelated persons was more restrictive than the number of persons in the average size traditional family. The municipality had argued in Boraas that there was a rational basis for a limitation because traditional family size tends to be self-limiting while there was conceivably no limit to the number of unrelated persons who could reside together in the absence of some legal limitation. Thus, the municipality's legitimate interest in limiting population density served as the necessary rational basis for the classification. The Court did not reject this argument, but rather pointed out that if this was the objective, the statute was overly broad.

> ". . . For instance, if it (the Zoning Classification) were aimed at maintaining population density at the level of traditional family units, it would not limit the number of unrelated occupants to two (2) persons per one-family dwelling, which admittedly is smaller than the size of the average family. Assuming such a purpose, a more permissive ordinance would suffice." 476 F. 2d at 817.

Thus, the Court in Boraas did not decide the question of whether a limit which was greater than

the size of the average traditional family would be supportable under the equal protection clause. Five persons is greater than the size of a traditional family and a limit of four unrelated persons has been upheld as being within the state's police power, Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N. D. Cal. 1970).

An even more important difference between the two cases than the statutory language, however, is that the decision in the instant case did not rest upon the five-person requirement. Rather, the Court below held that irrespective of the number of persons who are physically housed in the group homes, the use is not residential. It was, in fact, the Trial Court which based a distinction in treatment on the five-person limitation. It held that therapeutic homes of more than five children required site approval while those of five or less did not. (A. 47). The Wisconsin Supreme Court reversed holding that therapeutic homes are treatment facilities and not residential uses regardless of the number of children involved.

> ". . . The use of the premises is not even principally for residential living purposes. Rather, its primary use is to provide care and treatment for emotionally disturbed children. . . . The therapeutic home "arrangement" is substantially different than a group of priests, nurses, school teachers, students or others who acquire premises to use as a residence for a group. . . ." (A. 18-19)

It, thus, becomes clear that even if the five-unrelated-person requirement were to be invalidated, such a decision would not require a reversal of this

case. For the decision rests not on the number of persons who are cared for in the home, but upon the nature of the land use occasioned by the home itself. The question then becomes merely one of interpreting the meaning of the term "residential use" as used in the Zoning Ordinance -- hardly a question with which the Supreme Court of the United States ought to concern itself.

Since the decisions in the two cases are clearly not in conflict with each other, a granting of certiorari based on such conflict, as alleged by the Petitioner, would be clearly inappropriate.

III

THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT PETITIONER'S CONTENTION THAT THE ORDINANCE DISCRIMINATES AGAINST EMOTIONALLY DISTURBED CHILDREN

Petitioner has assumed, for the purpose of creating constitutional issue, a fact which is not supported in the record. Specifically, Petitioner has assumed that the classifications made were based on the traits of the persons who are housed in the therapeutic homes rather than on the nature of these homes themselves. The fact is, however, that the classifications were made on the differences of the homes and not on the differences of the children. The Court below emphasized this repeatedly in its opinion.

> ". . . These two types of homes have substantial differences that permit separate reasonable classifications. Therapeutic homes are not being denied equal protection

> of the law under the zoning ordinance." . . . (A. 22) (Emphasis added.)

In addition to the fact that the ruling of the Court below was not based on any differences related to the children, there is no support for an argument that the Ordinance is intended to relegate emotionally disturbed children to a separate class for residential purposes. Petitioner has revealed no section of the Ordinance, nor was the Respondent able to discern such a section, which would limit the right of an emotionally disturbed child to reside in a single-family residence district in a setting other than a treatment facility. Moreover, in addition to the therapeutic homes, many other types of treatment facilities require site approval. Sec. 10.12 (2) (c) of the Dane County Zoning Ordinance (1971) lists the following categories of treatment facilities which require an Approval of Site:

> (c) Hospitals, nursing homes, convalescent homes, extended care facilities, sanitariums and orphanages. . . .

Treatment facilities for emotionally disturbed children have, therefore, <u>not</u> been singled out for special treatment under the Ordinance. How then can the Court conclude that the emotionally disturbed children have been singled out for exclusion from the residential districts? Doesn't it make at least as much sense to conclude it is the operational character of these treatment facilities which are being regulated? If the Court were to conclude that these children have been discriminated against in this case, might it not also conclude that the Ordinance discriminates against the aged, the sick and the injured because site approval is required for

nursing homes, hospitals, and extended care facilities? Respondent contends that such a finding in this case would not only be totally unsupported on the record in this case, but absurd as well.

Because there is no evidence to support the assertion by Petitioner that the Ordinance discriminates against emotionally disturbed children, the contentions made under subheadings I and II in the Petition for Certiorari do not serve as a basis for this Court to grant certiorari.

CONCLUSION

For all of the above reasons, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

GLEN L. HENRY,
DANE COUNTY CORPORATION COUNSEL

ROBERT M. HESSLINK, JR.
ASSISTANT CORPORATION COUNSEL

Room 313 D
City-Co. Bldg.,
210 Monona Ave.
Madison, Wisconsin 53709

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents,

No. 73-886

SUPPLEMENTAL BRIEF

RICHARD C. GLESNER
ROBERT D. MARTIN
PAUL A. CROAKE
Counsel for Petitioner

Ross, Stevens, Pick & Ross, S.C.
110 East Main Street
Madison, Wisconsin 53703

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-886

BROWNDALE INTERNATIONAL LIMITED,
A Canadian Corporation,
Petitioner,

v.

BOARD OF ADJUSTMENT FOR THE COUNTY OF DANE, Consisting of MILLARD ERICKSON, OSCAR HOLTE and HARLAND DAHLK, and TOWN OF COTTAGE GROVE,
Respondents,

SUPPLEMENTAL BRIEF

The petitioner, Browndale International Limited, pursuant to Rule 24 (5), Rules of the Supreme Court of the United States, hereby submits to the Court a recent decision rendered by the Honorable John W. Reynolds, U. S. District Judge, U. S. District Court, Eastern District of Wisconsin, on January 8, 1974. This case, *Robert Timberlake, et al., v. Jerry Kenkel, et al.,* Civil Action #72-C-664, was not available at the time the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin was filed. The case is reprinted in full in this supplemental brief.

The *Timberlake* decision further emphasizes:

(a) The re-occurring nature of the problem that arises out of the restrictive definition of the word "family" in zoning ordinances; and

(b) The increasing readiness of courts to declare restrictive definitions of the word "family" to be in violation of the Equal Protection clause of the United States Constitution.

RESPECTFULLY SUBMITTED,

Richard C. Glesner
Robert D. Martin
Paul A. Croake

Counsel for Petitioner

Ross, Stevens, Pick & Ross, S.C.
110 East Main Street
Madison, Wisconsin 53703

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT TIMBERLAKE, BARBARA TIMBERLAKE, PAUL BECKWITH, and LEAH BECKWITH,

Plaintiffs,

v.

JERRY F. KENKEL, Inspector of buildings, Village of Shorewood; VILLAGE OF SHOREWOOD, a municipal corporation; BOARD OF APPEALS OF VILLAGE OF SHOREWOOD; and all their employees agents, attorneys, delegates successors, and assigns, individually and in their official capacities,

Defendants.

OPINION AND ORDER

Civil Action
No. 72-C-664

U. S. Dist. Court East Dist. Wis.
F I L E D
JAN 8 1974
at o'clock M
RUTH W. LA FAVE, Clerk

This is a civil rights action in which the plaintiffs seek to have this court declare unconstitutional several sections of the Municipal Code[1] of the Village of Shorewood (hereinafter referred to as the "Code") which in essence prohibits persons from living together in a relationship that does not conform to the family unit as defined by the Shorewood ordinance.

The plaintiffs are two married couples unrelated by blood. They and their children think of themselves as a "family." Specifically, Paul Beckwith, Leah Beckwith, and

their children, Christopher and Angela, together with Robert Timberlake, Barbara Timberlake, and their children, Karen and Jeffrey, have been and are living in a residence zoned "single family" by the Village of Shorewood. Defendants are Jerry F. Kenkel, inspector of buildings for the Village of Shorewood; the municipality of Shorewood; and the individual members of the Village Board of Appeals. The reason for this suit is that the plaintiffs' living arrangement is in violation of several of defendants' zoning ordinances.

At the outset, definitional problems arise over usage of the word "family." Defendants define "family" in § 9-101B.2. of their Code as follows:

> "FAMILY shall mean an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not be related by blood, marriage or legal adoption, living together in a dwelling unit; included within the definition of a family shall be children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats., whereby a foster home license is issued, provided that the number of children shall not exceed 4, unless all are in the relationship to each other of brother or sister."

The plaintiffs call themselves a "family." They, however, define "family" in a different manner than the defendants. Their definition essentially corresponds with one provided in Black's Law Dictionary at 727 (1951): "In broad or primary sense 'family' means: a collective body of any two persons living together in one house as their common home for the time; * * *" and another found in Webster's Third New International Dictionary (unabridged) at 821 (1966) which defines "family" as "* * * a group of individuals living under one roof: HOUSEHOLD * * *." For the purposes of this

lawsuit, plaintiffs and defendants agree that their respective definitions of "family" are not the same and, indeed, are the root cause of the present action. In this opinion, I have attempted to carefully identify whose concept of "family" I am referring to at the particular point in time the word arises.

Jurisdiction is claimed under 28 U.S.C. § 1331, § 1343 (3), and 42 U.S.C. § 1983. This matter is before the court on both defendants' motion to dismiss on jurisdictional grounds and for failure to state a claim upon which relief can be granted and on plaintiffs' motion for summary judgment. Oral argument was heard on all pending motions. I grant the defendants' motion to dismiss the action against the defendant Village of Shorewood, deny the defendants' motion to dismiss as to all other parties, and grant the plaintiffs' motion for summary judgment. I hold that since the zoning ordinance attacked here (i.e., defendants' definition of "family") is not supported by any rational basis consistent with traditional zoning objectives, it therefore violates the equal protection clause of the Fourteenth Amendment.

The present action arose in the following manner. The plaintiffs Paul Beckwith and Leah Beckwith hold legal title to the property as joint tenants. The residence in question is located at 4065 North Richland Court in Shorewood, and consists of a two-story house and lot. The residence is situated within a use district zones as "Single Family Residence" pursuant to the Village Code. On October 7, 1972, the Beckwiths were joined by the Timberlakes, and they all commenced living together as one family. On October 18, 1972, building inspector Kenkel visited their residence and orally informed them that their living arrangement was in

violation of the Code. On November 1, 1972, Kenkel further informed them of that fact by letter and requested that "this violation must be corrected without delay." In addition, the letter asked that plaintiffs contact him if they had any questions concerning the matter. On November 15, 1972, the plaintiffs' attorney wrote a letter to the building inspector requesting additional information about the alleged violation and specifically asking whether the letter of November 1, 1972, was an appealable determination of the Code. Shorewood took this matter under advisement, and plaintiffs initiated the instant lawsuit on December 6, 1972, before defendants responded to their request.

The following facts are set forth in the verified complaint, answer, and affidavits filed by both parties. There are no material facts in dispute. Paul Beckwith holds title to the premises in question, and these premises consist of a two-story house and lot. The house is the type ordinarily regarded as a single family dwelling. The house consists of a living room, dining room, kitchen, family room, sunroom, study, four bedrooms, and three baths, all making up approximately 2,300 square feet of living space. The premises have been occupied by all the plaintiffs since October 7, 1972, when they formed the present living arrangement. This living arrangement is based on the fact that plaintiffs have voluntarily assumed all of the major tasks involved in the care and unkeep of the premises in question; that the plaintiffs contribute an equal amount to the expenses connected with their living arrangement including monthly payments on the mortgage, utility bills, expenses for repair, and maintenance of the premises, and food, furnishings, and household items used by all; and that the plaintiffs also prepare and eat meals together and share the rooms such as the library, study,

workroom, and laundry. In their first affidavit, plaintiffs explain the reasons why they live as a one-family unit. Robert Timberlake is an ordained minister of the United Presbyterian Church; Leah Beckwith and Paul Beckwith are both members of the church, Paul currently serving as a ruling elder and Leah serving as a teacher; and Barbara Timberlake has been active in church work. Each of them adheres to three basic tenets of "orthodox" Christianity; i.e., first, love thy neighbor; second, create stable marriages; and three, liberate the sexes from traditional stereotypes and sex roles. Due to these beliefs, and prior to living together, plaintiffs desired to share the duties of child rearing equally between husband and wife, but one husband's work day prevented this. Plaintiffs wanted to make available to their children the emotional support of the extended family with several adult figures present, but this was impossible because their nearest blood relatives were hundreds of miles away. Therefore, it seemed true to their beliefs and desires that they establish one family.

In their second affidavit, plaintiffs add that Robert Timberlake and Barbara Timberlake paid $5,000 of the down payment of $10,000 and contribute one-half of the monthly mortgage payments; that all expenditures for food, repairs, capital improvements, and utilities are divided equally between the parties; and that the plaintiffs believe the sharing of work, economic burdens, and living space is an integral part of their living experience.

In his affidavit, defendant Kenkel states that in 1970 the population of the Village of Shorewood was 15,576 residents; that there were 6,017 housing units, 2,375 of which were single family and 3,681 of which were multi-family structures;

that the village provides more than an adequate opportunity to purchase multi-family structures without violating the Code; and that the Beckwiths purchased a residence in an area zoned single-family without notifying the Village that they and the Timberlakes were going to live together as one family.

The affidavit of the seven duly-elected trustees[2] of the Village of Shorewood state that they can enact, amend, and review zoning laws; that they reviewed the definition of "family" as contained in their Code; and that they believe that their definition of "family"[3] is substantially related to the public health, safety, morals, and general welfare of the Village in twelve respects which basically fall within the following four categories: it preserves the residential character of the community; it preserves residential property values; it controls population density and therefore insures the availability of better services to Village residents; and it protects the cherished ideals of the family and preserves the high moral character of the Village.

Mr. Ralph von Briesen states in his affidavit that he was the former owner of the property in question at 4065 North Richland Court; that he sold it to the Beckwiths ; that at no time was he aware that the Beckwiths were planning to occupy the residence with the Timberlakes; and that the Beckwiths led him to believe that only they and their children were going to occupy the premises.

I. Procedural Questions

In their complaint, plaintiffs specifically allege that their rights under the Fourteenth Amendment have been abridged by an arbitrary classification which interferes with several of their rights, among these being the First Amendment rights to free exercise of religion and freedom of association; and further, the right to privacy, whether founded in the Fourteenth Amendment, the Ninth Amendment, or the penumbrae of various amendments. Additionally, plaintiffs allege that they have been deprived of their constitutional right to travel and settle where they please. I find that the complaint properly alleges that the defendants have infringed a federally guaranteed right, privilege, or immunity secured to the plaintiffs by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens. Thus, the requirements of 28 U.S.C. § 1343 (3) and 42 U.S.C. § 1983 are satisfied.

Defendants briefly argue for abstention by this court. Such a course of action has traditionally been justified only where there has been an ambiguity in the application and interpretation to be given a state or local law. *Zwickler v. Koota*, 389 U.S. 241 (1967). Such is not the case here. The state or local statute is not ambiguous. All the parties agree that the conduct the plaintiffs wish to pursue is clearly contrary to the written municipal ordinance.

Defendants further assert that the present action should be dismissed because plaintiffs have not exhausted their administrative remedies. They alleged that since zoning is peculiarly a local problem, and since the State of Wisconsin has provided a procedural mechanism (§ 62.23 (7) (e))[4] for

seeking zoning changes, plaintiffs should be required to pursue their remedies at a lower level than the federal district court. The United States Supreme Court held in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), that the goals of the Civil Rights Act may not be defeated because relief was not first sought under a state law which provided a remedy. The Court stated:

> "* * * It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. * * *"

In the instant case, it further appears that plaintiffs' claim that their civil rights have been deprived (under 28 U.S.C. § 1343 (3) and 42 U.S.C. § 1983), is based entirely on federal law, there being no underlying issues of state law. Therefore, *McNeese v. Board of Education*, 373 U.S. 668 (1963), controls and plaintiffs do not have to exhaust their administrative remedies.

Defendants have also moved for dismissal of the action as against the defendant Village of Shorewood on the ground that 28 U.S.C. § 1343 (3) and 42 U.S.C. § 1983 do not apply to municipalities. The Village of Shorewood is a municipal corporation formed pursuant to the laws of the State of Wisconsin. The United States Supreme Court additionally found in *Monroe v. Pape*, 365 U.S. 167, 187-192 (1961), that a municipality is not within the purview of § 1983. The Seventh Circuit carved out an exception to this, finding that actions for equitable relief were maintainable against municipal corporations under § 1983. *Schnell v. City of Chicago*, 407 F. 2d 1084 (1968); *Adams v. City of Park Ridge*, 293 F. 2d 585 (1961). Recently, however, the Supreme Court corrected this approach by stating that § 1983 did not

have a bifurcated application to municipal corporations depending on whether equitable or monetary relief was sought. *City of Kenosha v. Bruno,* 412 U.S. 507 (1973). Therefore, as against the defendant Village of Shorewood, plaintiff's action for equitable relief should be dismissed. Concerning this dismissal, there is nothing in the record to allow me to conclude that there is more than $10,000 in controversy, and thus to find an alternative ground of jurisdiction, that of 28 U.S.C. § 1331, on which to base jurisdiction over the defendant municipality. See *City of Kenosha v. Bruno,* supra, at 516 (Mr. Justice Brennan, concurring).

II. Substantive Questions

The standard with which I begin is that presented in *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926). In *Euclid* the owner of a parcel of unimproved land contested the constitutionality of several zoning ordinances which set minimum lot sizes, maximum building heights, and prohibited, for example, the use of land for apartments. The United States Supreme Court, in upholding the ordinances, stated:

> "* * * while the meaning of constitutional guaranties never varies, the scope of their application must expand or contact to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning,* but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall." 272 U.S. at 387.

The Court continued:

> "* * * the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [Citations omitted.]" 272 U.S. at 395.

Shortly after the decision in *Euclid,* the Supreme Court showed itself willing to rule against zoning ordinances. In *Nectow v. City of Cambridge,* 277 U.S. 183, 188 (1928), the Court specified a standard to be examined in finding a zoning ordinance unconstitutional:

> "* * * The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited * * * such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. * * *"

Thus, from the very beginning it was realized that although almost every zoning ordinance represented a restriction upon a citizen's right to use his land, and although these zoning ordinances may in general be a proper exercise of governmental power, it was equally possible that they may constitute an illegitimate restriction of a citizen's rights unless supported by a substantial public purpose. In the early cases the constitutionality of the local zoning laws was attacked under the due process clause. Today, however, as was stated in *Boraas v. Village of Belle Terre,* 476 F. 2d 806, 813 (2d Cir. 1973): "To the requirement that zoning laws satisfy due process, as thus enunciated by *Euclid* and its breathren, there must be added the important condition that they not discriminate in violation of the Equal Protection

Clause." The possibility that the standards of substantive due process will be utilized by the federal courts to analyze zoning ordinances is remote. See Note, "The Equal Protection Clause and Exclusionary Zoning After *Valtierra* and *Dandridge*," 81 Yale L.J. 61, 66 (1971).

Debate over the constitutionality of the Shorewood zoning ordinance has therefore evolved around the question of whether or not the requirements of the equal protection clause are satisfied. Firstly, the parties are in agreement that the ordinance does not raise an issue as to a "suspect" classification. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Graham v. Richardson*, 403 U.S. 365 (1971); and *Griffin v. Illinois*, 351 U.S. 12 (1956). Secondly, I do not feel that I should, for reasons hereinafter stated, decide whether there has been an abridgement of "fundamental" rights. Consequently, the present case does not fit into any of the categories requiring application of the compelling state interest test.

Plaintiffs argue to the contrary — that their fundamental rights have been abridged. They place much weight on the theory that if not allowed to live as one family, their right to religious freedom will be abridged. Plaintiffs specifically describe their religious beliefs and the manner in which these beliefs motivate their lives. They cite the case of *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), for the proposition that "* * * only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Plaintiffs additionally argue that if they are not allowed to live as one family, they will be denied their constitutional right of association. They add to this the feeling that

in dealing with freedom of association involving a set of relationships as intimate as those between the plaintiffs, it is inevitable that the right become intermingled with the right to privacy as articulated in *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113 (1973). Based on these cases, the plaintiffs present the following argument: that if it were possible to design the "zone of privacy" discussed in *Griswold*, the home would lie at the very center, and within the home the association of the individuals who lived there would in turn occupy a central position. Defendants contend, however, that these are not the objectives of the Shorewood zoning ordinance. They argue that, in fact, the opposite is true, for Shorewood has established twelve different zoning districts[5] in an effort to provide opportunities within the Village for all options. Defendants further allege that not only did zoning allow complete development to suit the living patterns sought by individuals like the plaintiffs but that there are numerous structures so developed.

According to the present methodology of the United States Supreme Court in these matters, I need not resolve these questions; that is, whether or not the zoning ordinances in question serve to infringe the plaintiffs' fundamental rights to religious freedom, freedom of association, or privacy. While the rights alleged by plaintiffs are "fundamental" in the context of the specific cases in which they are defined, I am not going to decide that an extension of those cases to the present fact situation is justified. Hence, I do not decide the issue of fundamental rights.

Certainly the rights claimed by the plaintiffs are important. Although it is clear that it is not within the province of

the court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws, it is also evident that the equal protection clause has lost none of its bite.[6] See *Chicago Police Dep't. v. Mosley*, 408 U.S. 92 (1972); *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Reed v. Reed*, 404 U.S. 71 (1971); *Jackson v. Indiana*, 406 U.S. 715 (1972) (decided on alternative grounds); *Sugarman v. Dougall*, — U.S. — (decided June 25, 1973); and *In re Griffiths*, — U.S. — (decided June 25, 1973). These cases make it clear that in most instances the Supreme Court has replaced the rigid "two-tiered" formula with a more flexible approach.

In the absence of a suspect classification and/or a fundamental interest, the question is whether the legislative distinction is arbitrary and without rational relationship to a legitimate legislative objective. As the Supreme Court recently stated in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971):

> "* * * this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted.] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the object of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced

> shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the particular statutes involved]."

Thus, I am to consider the nature of the unequal classification attacked, the nature of the adversely affected rights, and the governmental interest urged in support of the classification. This appears to be a more realistic methodology than that formerly used under the two-tiered formula, since sometimes in cases where no suspect classifications or fundamental rights were at issue, blatant inequalities went unchecked. This approach is particularly appropriate in the instant case where individual human rights of oposing groups are involved rather than issues concerning business regulations. *Boraas v. Village of Belle Terre*, 476 F. 2d 806, 815 (2d Cir. 1973). See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n. 4 (1938); Tussman and tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 373 (1949). Furthermore, this approach is especially appropriate because the instant case involves delicate and difficult questions of local planning, a consideration counseling a more restrained form of review. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

The nature of the plaintiffs' adversely affected rights having already been examined, I must inquire whether the defendants have shown that the classifications in question here are rationally related to a legitimate governmental interest. Identifying the municipality's purposes in the passing of an ordinance is not an easy task. Here, the declared

policy of the Shorewood zoning ordinances is ordained by the Village Board as follows: "It is hereby determined that public health, welfare, morals and convenience shall be protected, promoted and conserved by the regulations contained in this ordinance." See § 8-301, Code. Defendants have submitted the affidavit of the seven trustees of the Village Board. In this affidavit the trustees essentially assert that the challenged ordinance should be upheld as rationally related to the clearly legitimate governmental interests of (1) preserving the residential character of the municipality, (2) preserving its residential property values, (3) establishing population density control, and (4) preserving the high moral standards of the community. In their brief, defendants repeat this line of thought with the exception that they do not seriously argue that single-family housing as defined by the ordinance preserves the high moral character of the community. It therefore appears that defendants do not present this as one of the legitimate governmental interests to be weighed in considering the constitutionality of the statutes.

What is contended here is, in essence, that by adopting a "single-family" zoning ordinance for certain areas within the Village (1) single families are more likely than families with more than three unrelated members to preserve the residential character of the municipality; (2) single families are more likely than voluntary families ro preserve residential property values; and (3) single families are more likely than voluntary families to be smaller in size and, therefore, more in accordance with population density control standards.

I am guided by the recent Supreme Court decision in *U.S. Dept. of Agriculture v. Moreno*, — U.S. — (decided June 25, 1973). In *Moreno* the Court found § 3 (e) of the

Food Stamp Act to be unconstitutional as it differentiated between two classes of individuals, one class being composed of those individuals who live in households, all of whose members are *related* to each other, and the other class consisting of those individuals who live in households containing one or more individuals who are *unrelated* to the rest. The Court found this distinction between *related* and *unrelated* persons to be wholly without any rational basis and therefore invalid under the due process clause of the Fifth Amendment. The situation in *Moreno* is not unlike that found in the instant case.

In *Moreno*, the Supreme Court specified that an examining court should analyze other sections of the statute in question in considering whether these sections accomplish the same results as those envisioned for the particular section in question.

The Code of Shorewood provides other means than the "single-family" zoning provision to deal with the problems of preservation of the residential character, preservation of the residential property values, and establishment of population density control. For example, § 8-304 of the Code states in subsection E that it shall be unlawful to maintain or erect any coop or pen for poultry, rabbits, cows, etc; that rooming houses are prohibited in the Village; and that the construction of filling stations shall be restricted. And § 8-306 provides insubsection A that no trade, business, or profession shall be carried out from a "Single Family" residence; that it is unlawful to erect or maintain any building for church, school, museum, hotel, hospital or sanitarium purposes, or apartments designed for residence usage; and further provides in subsection B that the size of residential lots is regulated as not being allowed with street fronts of not less than

50 feet and with areas of not less than 6,000 square feet; that no "single family" residence building can occupy more than 30 per cent of the area of an interior lot nor more than 40 per cent of a corner lot. Subsection C provides set regulations and subsection D provides maximum height regulations for single family residences. The existence of these provisions shows that there are other ways to preserve both residential character and property values, and also establish population density control. These latter provisions are as responsive to those alleged goals as the provision that more than three unrelated individuals cannot live together in an area zoned "single-family."

Defendants' allegations that the zoning ordinances are rationally related to the clearly legitimate governmental interests of (1) preserving the residential character of the municipality, (2) preserving residential property values, and (3) establishing population density control, must be individually examined. I find that the means utilized by the Village of Shorewood, that of "single-family" zoning, not to be rationally related to any of the three government interests listed above. I also find that less onerous means exist to reach these same ends. For the purpose of this examination, I assume, without deciding, that the reasons given for defendants' zoning ordinance are valid legislative goals.

Defendants argue first that "single-family" zoning ordinances preserve the residential character of the community. They state that prior to zoning, haphazard conditions existed in municipalities respecting the location of buildings and uses for dwellings, trades, and industries, commercial and otherwise. After the advent of zoning, municipalities then became able to regulate building development

and the use of property by classifying three broad categories of uses: districts devoted entirely to single-family residences on a prescribed minimum lot, districts in which multi-family structures are permitted, and business districts subclassified into several districts with different uses in each. In this traditional zoning argument, defendants argue that single-family zoning controls congestion in the streets and the use of open spaces within the community. This is not a persuasive argument. One characteristic of suburban growth in the United States has always been the ability of the suburbs to absorb rapid population growth. Note, "Exclusionary Zoning and Equal Protection," 84 Harv. L. Rev. 1645, 1667 (1971). Defendants' viewpoint that voluntary families would not preserve the residential character of the community is pure speculation. Such a conclusion is entirely unsupported by the evidence, and I am unable to judicially notice it.

While the aesthetics of the community is a desirable value, the means approach requires that I inquire as to whether "single-family" zoning implements this at too high a cost or whether the same end could be reached by less onerous means. As I mentioned previously, the Shorewood ordinances already include several provisions insuring a maintenance of the high aesthetic quality of the community. I find such provisions as set-back requirements, size of lot, and height regulations to be more rationally related to aesthetic considerations than the "single-family" requirement.

Defendants further argue that the "single-family" zoning ordinance preserves property values. Defendants' argument cuts both ways. They indicate that the single-family ordinance provides for a stable community of citizens and prevents

inflated property prices and inflated rentals. At another point, however, they imply that the end of single-family housing will make the community less aesthetic, will result in more traffic and more children, will reduce the quality of police, fire, transportation, and educational services and, consequently, will drive property values down. The contradictory approach that defendants take here persuades me that their arguments are nothing but mere conjecture. Here again, defendants have not introduced one iota of evidence into the record in support of their theory. Several commentators have noted that changes in the social composition of a municipality do not necessarily affect property values. L. Laurenti, *Property Values and Race* 47 (1960); Note, 84 Harv. L. Rev. at 1666. To theorize otherwise, without a proper record, is beyond the power of this court.

Defendants finally argue that "single-family" housing is a means of controlling population density. Defendants assume that their definition of "family" is self-limited and that the plaintiffs' "family" can be any size whatsoever. This argument is again mere speculation. No statistical information has been presented to the court in support of this proposition. If control of population density were the real goal of the ordinance, the definition of "family" found in § 9-101B.2. would not provide for the respective inclusion of those individuals related by marraige to members of the family and, therefore, would not allow a situation to exist whereby numerous brothers and sisters could live together with their respective spouses, along with foster children, and still be considered a "single-family" under the ordinance. See *City of Des Plaines v. Trottner,* 216 N.E. 2d 116, 119 (1966). Furthermore, if the ordinance was designed to limit population density at the same level as that existing in nuclear

family units, it would not limit the number of unrelated individuals to three per single-family housing unit. This figure is without a doubt lower than the size of the average nuclear family. As was stated in *Boraas v. Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), at 817:

> "* * * Assuming such a purpose, a more permissive ordinance would suffice. Furthermore, such an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit. * * *"

In conclusion, there is no rational basis for the ordinances in question, and there are less onerous means to achieve the desired ends. Some of these already are in the Municipal Code and some more could be adopted.

The defendants argue that other housing is available to the plaintiffs within the municipality of Shorewood. This argument is not persuasive because it assumes that the original classification was a rational one, and for the reasons stated above, I have found that it was irrational, and an irrational classification is not saved because one can escape its irrationality by living elsewhere. In *Boraas v. Village of Belle Terre,* supra, the municipality was totally zoned single-family. The Second Circuit did not agree with the municipality's argument that any constitutional infirmity was swept away by the fact that single-family housing was available in other surrounding communities which were not similarly zoned. The Court stated at 817:

> "* * * The fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights. See Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Appellants are entitled,

subject to lawful and reasonable local laws, to travel and settle down where they please. See King v. New Rochelle Municipal Housing Authority, 442 F. 2d 646, 648 (2d Cir. 1971); Cole v. Housing Authority, 435 F. 2d 807 (1st Cir. 1970), affirming 312 F. Supp. 692 (D.R.I. 1970). * * *"

In conclusion, the attacked provisions of the Code[9] have not been shown to be supported by any rational basis which is consistent with permissible zoning objectives. They must, therefore, be held to be unconstitutional as in violation of the equal protection clause of the Fourteenth Amendment.

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment be and it hereby is granted.

IT IS FURTHER ORDERED that the defendants' motion to dismiss this action as against the municipality of Shorewood be and it hereby is granted, and the defendants' motion to dismiss as to all other parties be and it hereby is denied.

Dated at Milwaukee, Wisconsin, this *8th* day of January, 1974.

/s/ John W. Reynolds
U. S. District Judge

FOOTNOTES

[1] Plaintiffs specifically attack the definitions of "family" as contained in § 9-101B.2. and § 9-204B.1. of the Municipal Code. Section 9-101B.2. states:

> "FAMILY shall mean an individual, or 2 or more persons related by blood, marriage or legal adoption, or a group of not more than 3 persons who need not be related by blood, marriage or legal adoption, living together in a dwelling unit; included within the definition of a family shall be children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats., whereby a foster home license is issued, provided that the number of children shall not exceed 4, unless all are in the relationship to each other of brother or sister."

Section 9-204B.1. states:

> "* * * Family, within the meaning of this subsection, shall include an individual or 2 or more persons related by blood, marriage or legal adoption, including children placed with a family in a dwelling unit under the provisions of Ch. 48 Wis. Stats. whereby a foster home license is issued and the number of children placed thereunder does not exceed 4 unless all are related to each other as brother or sister."

[2] Chester Krizek, Allan J. Klotsche, George W. Bolln, David Keyser, Grace Abramson, James H. Larson, and Edward L. Heidenreich.

[3] See § 9-101B.2., supra n. 1.

[4] Section 62.23 (7) (e) 7, Wis. Stats. (1971), states in part:

> "The board of appeals shall have the following powers: To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. * * *"

[5] Section 8-302 of the Municipal Code divides Shorewood into twelve districts known as:

1. Lake Drive Residence District
2. Single Family Residence District
3. One and Two-Family Residence District
4. Estabrook Homes District-Residential
5. Estabrook Homes District-Business
6. Apartment House District
7. Multi-Family District No. 1
8. School, Church and Public Building District
9. Hopsital Zone District
10. First Business District
11. Third Business District
12. Planned Development District

[6] See generally Gunther, "The Supreme Court 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972). Gunther illuminates the path taken by the Supreme Court during the 1971 term in the area of equal protection by stating at page 20:

> "The mood is far different in last term's interventionist invocations of old equal protection formulas. In terms of the long-standing connotations of the old equal protection, the decisions are novel if not bizarre. Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classification is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentations is substantially narrowed."

[7] Gunther, supra, pages 11-12, states that of the fifteen cases in his study, the constitutional challenge was rejected in only four: *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Schilb v. Kuebel*, 404 U.S. 357 (1971); *Richardson v. Belcher*, 404 U.S. 78 (1971).

[8] The two districts exclusively zoned single-family are (1) the "Lake Drive Residence District," and (2) the "Single Family Residence District." These two districts essentially run north and south, following the Lake Michigan shoreline, and correspond with the most attractive area in the Village of Shorewood.

[9] See footnote "1" above.